UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CN.9/362/Add.14
10 March 1992

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW
Twenty-fifth session
New York, 4 - 22 May 1992

INTERNATIONAL COUNTERTRADE

Draft Legal Guide on International Countertrade Transactions

Report of the Secretary-General

Addendum

XIV. CHOICE OF LAW

Contents

	Paragraphs
A. General remarks	1-7
B. Choice of applicable law	8-24
C. Choosing the same or different national laws to govern countertrade agreement and supply contracts	25-29
D. Mandatory legal rules of public nature	30-33

8178T

V.92-51844

[Editorial note: The present draft chapter is a revision of draft chapter XIV, "Choice of law", published as document A/CN.9/WG.IV/WP.51/Add.5. The note in square brackets at the beginning of each paragraph indicates either the number under which the paragraph appeared in document A/CN.9/WG.IV/WP.51/Add.5 or that the paragraph is new. The revisions of paragraphs that appeared in document A/CN.9/WG.IV/WP.51/Add.5 are underlined.]

A. General remarks

1. [3] This chapter focuses on the choice by the parties to the countertrade transaction of the law applicable to the countertrade agreement, the supply contracts in the two directions, and the contract by which a party committed to fulfil a countertrade commitment engages a third party to fulfil that commitment. The chapter considers also the question whether the countertrade agreement and the contracts forming part of the transaction should be made subject to a single national law or to different national laws (section C). This chapter does not discuss the law applicable to other related arrangements in which a person who is not a party to the countertrade transaction is involved. Such other arrangements may include a guarantee supporting fulfilment of a countertrade commitment, an agreement between countertrade parties and their banks concerning linked payment arrangements, and an interbank agreement between banks involved in carrying out payment arrangements. Certain aspects of the law applicable to such arrangements are discussed in chapter XII, "Security for performance", paragraphs [3], [5] and [13], and chapter IX, "Payment", paragraphs [4], [7], [16], [18], [19], [24] and [37].

2. [1] Under the rules of private international law of many national laws, the parties are permitted by agreement to choose the applicable law, though under some of those laws there are certain restrictions on that choice (rules of private international law are in some legal systems referred to as "conflict of laws" or "choice of law" rules). If the parties do not choose the applicable law, the applicable law is determined by the application of rules of private international law.

3. [2] It should be noted that by choosing the applicable law the parties are not making a choice as to jurisdiction for settlement of any disputes. Issues relating to jurisdiction are discussed in chapter XV, "Settlement of disputes".

4. [4] Whatever be the law applicable to the countertrade agreement or the supply contracts, particular aspects of the countertrade transaction may be affected by mandatory legal rules of an administrative or other public nature in force in the countries of the parties or in the country where their obligations are to be performed. Those mandatory legal rules may regulate certain matters in the public interest, for example, international transfers of funds, the types of goods that may be traded in countertrade transactions, and restrictive business practices (see below, section D).

5. [5] In addition, the extent to which the parties may designate particular issues to be governed by the chosen law may be limited. For example, regardless of the choice by the parties, the law of the State where

goods are situated may govern the transfer of ownership of those goods, and the law of the State in which the bank holding funds is located may govern disposition of the funds. The question of which State's procedural law is to govern arbitral or judicial proceedings for the settlement of disputes arising in connection with the countertrade transaction is discussed in chapter XV, "Settlement of disputes".

6. [6] A sales contract forming part of the countertrade transaction may be subject to the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980). According to its article 1, the Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States, or (b) when the rules of private international law lead to the application of the law of a Contracting State. It should be noted that, even if the law of a State that is a party to the Convention is the applicable law, there is a divergence of opinion as to whether the Convention would apply to a countertrade agreement containing a commitment to conclude a supply contract in the future. However, uncertainty appears not to exist in the laws of some States as to the applicability of the Convention to a countertrade agreement that contains all the essential elements of the supply contract yet to be actually concluded. This is because, in those States (as noted in chapter IV, paragraph 40), a party refusing to honour such a commitment may be deemed to have consented to the actual contract of sale.

7. [7] For a discussion of contract drafting in the light of the applicable law, see chapter V, "General remarks on drafting", paragraph 6.

B. Choice of applicable law

8. [8] It is desirable for the parties to choose expressly the applicable law to govern the countertrade agreement and the supply contracts. Such an identification of the applicable law is useful because it enables the parties to gear the actions they take to fulfil their contractual obligations, or the actions taken pursuant to their contractual rights, to the requirements found in the applicable law. If the parties do not choose the applicable law, the result provided by rules of private international law may not be satisfactory to the parties. For example, absent a contrary choice by the parties, sales contracts in a counter-purchase or offset transaction are likely to be, according to the rules of private international law, subject to the law of the seller. If in such a transaction the countertrade agreement is not subject, by the rules of private international law, to the same law as the sales contract to be concluded pursuant to that countertrade agreement, contractual terms common to both the countertrade agreement and the supply contract may not be given the same meaning (see below, paragraph 25).

9. [9] An express choice of the law applicable to the countertrade agreement and the supply contracts is advisable also to avoid uncertainty as to what law applies. Uncertainty in the absence of a choice of law may arise from two factors.

10. [10] First, the applicable law is determined by the application of rules of private international law of a national law. When a dispute arises concerning the countertrade agreement or a supply contract that is to be settled in judicial proceedings, the rules of private international law

applied by the court settling the dispute will determine the applicable law. A court will apply the rules of private international law of its own country. If there is no exclusive jurisdiction clause agreed upon by the parties (see chapter XV, "Settlement of disputes", paragraph [41]), the courts of several countries may be competent to decide the dispute (e.g., the countries in which the parties to the dispute have their places of business or the country in which the obligation in question is to be performed). There may therefore be several possible systems of private international law that could determine the law applicable to the countertrade agreement or the supply contract. When disputes are to be settled in arbitral proceedings, the arbitral tribunal will determine what law is applicable, unless the parties have chosen the applicable law. In some cases, the arbitral tribunal will determine the applicable law according to the private international law rules that the tribunal considers appropriate; in other cases, the arbitral tribunal will directly determine the applicable law that the tribunal considers appropriate for the case, without express reference to the rules of private international law. It may be difficult to predict on which criteria or rules the arbitral tribunal will rely in determining the applicable law.

11. [11] The second factor producing uncertainty as to the applicable law is that, even if it is known which system of private international law will determine the applicable law to govern the countertrade agreement and the supply contracts, the criteria and concepts used in that system may be too general or vague to enable the parties to predict with reasonable certainty which law will be determined to be applicable. This difficulty is compounded in the case of countertrade agreements because of possible uncertainty as to the legal nature of the countertrade agreement and the consequent uncertainty as to which rule of private international law should determine the applicable law.

12. [12] [paragraph 13 as it appeared in A/CN.9/WG.IV/WP.51/Add.5 has been incorporated in the present paragraph] The extent to which the parties are allowed to choose the applicable law will be determined by the rules of private international law being applied. Under some systems of private international law, the autonomy of the parties is limited and they are permitted to choose only a national law that has some connection with the contract, such as the law of the country of one of the parties or of the place of performance. Such a limitation is sometimes referred to as the "nexus" rule. Under other systems of private international law, the parties are permitted to choose the applicable law to govern the countertrade agreement and the supply contracts without those restrictions. Since a court that is to settle a dispute will apply the rules of private international law in force in its country, the parties should agree upon a choice of law that would be upheld by the rules of private international law in the countries whose courts might be competent to settle their disputes. If the parties are considering an exclusive jurisdiction clause, they should pay particular attention to whether courts in the contemplated jurisdiction would uphold their choice of law. If a dispute is settled in arbitral proceedings, the law chosen by the parties will normally be applied by the arbitral tribunal. In order to avoid the application of a nexus rule, parties sometimes expressly stipulate in the choice-of-law clause that that rule should not apply. It should be noted that such a stipulation may have no effect inasmuch as the nexus rule is likely to be considered mandatory. The likelihood that such a stipulation would be upheld appears to be greater in arbitration proceedings.

13. [14] When choosing the law to govern the countertrade agreement or the supply contracts, it is in general advisable for the parties to choose the law of a particular country. The rules of private international law of a country where legal proceedings may be instituted in the future may not recognize the validity of a choice of general principles of law or of principles common to several countries (e.g., of the countries of both parties). Even if such a choice would be valid, it may be difficult to identify principles of law that could resolve disputes of the type arising in connection with a countertrade agreement or a supply contract. Nevertheless, such a choice might be feasible in certain circumstances.

14. [new paragraph] When an international convention relevant to the countertrade transaction is in force in a State, it is widely accepted that the choice of the law of that State will include that international convention. Such a choice of a convention through the choice of the national law is expressly recognized in article 1(b) of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980). Article 1(b) provides that the Convention applies to contracts of sale between parties whose places of business are in different States when the rules of private international law lead to the application of the law of a Contracting State.

15. [new paragraph] In some States it is recognized that parties can agree that their transaction should not be governed by a national law but by an international convention or by other rules of law such as an international legal text not having the force of an international treaty or a set of legal principles dealing with international trade. Other States, however, require the applicability of a national law, so that any international convention or other rules chosen by the parties will apply in so far as they do not contravene the mandatory provisions of the applicable national law.

16. [15] In many national laws a choice-of-law clause is interpreted as not to include the application of the rules of private international law of the chosen national law even if the clause does not expressly so provide. However, if that interpretation is not certain, the parties may wish to indicate in the clause that the substantive legal rules of the national law they have chosen are to apply. Otherwise, the choice of the national law may be interpreted as including the private international law rules of that national law and those rules might provide that the substantive rules of another national law are to apply.

17. [16] The parties may wish to choose as the applicable law the law of the country of one of the contracting parties. Alternatively, they may prefer to choose the law of a third country which is known to both parties and which deals in an appropriate manner with the legal issues arising from the countertrade agreement or from the supply contract. If the countertrade agreement or a supply contract provides for the jurisdiction of the courts of a particular country to settle disputes between the parties, the parties may wish to choose the law of that country as the applicable law. This could expedite judicial proceedings and make them less expensive, since a court will normally have less difficulty in ascertaining and applying its own law than the law of a different country.

18. [17] In the case of countries that have two or more territorial units in which different laws are applicable (as in some federal States), it is advisable to specify which one of those laws is to be applicable in order to avoid uncertainty.

19. [18] The parties may also wish to take the following factors into consideration in choosing the applicable law: (a) the parties' knowledge of, or possibility of gaining knowledge of, the law; (b) the capability of the law to settle in an appropriate manner the legal issues arising from the contractual relationship between the parties (for example, the parties may wish that their countertrade commitment to enter into future contracts would be given effect under the chosen law); (c) the extent to which the law contains mandatory rules that would prevent the parties from settling by agreement questions that arise in their contractual relationship.

20. [19] Changes legislated in the law chosen by the parties to govern the countertrade agreement and the supply contract may or may not affect contracts in existence at the time those changes are made. If the parties wish that only the legal rules in force at the time the countertrade agreement or supply contracts are entered into are to apply, it is advisable that they expressly so provide. However, parties should be aware that such a restriction will not be effective if the application of the changes in the legislation to existing contracts is mandatory.

21. [20] Different approaches are possible with respect to the drafting of a choice-of-law clause. One approach may be merely to provide that the countertrade agreement or the contract is to be governed by the chosen law. This approach may be sufficient if it is clear that the body chosen to settle disputes between the parties will apply the chosen law to all the issues that the parties desire to be regulated by it. A second approach may be to provide that the chosen law is to govern the countertrade agreement or contract in question, and also to include an illustrative list of the issues that are to be governed by that law (e.g., formation of contract, or breach, termination, or invalidity of the countertrade agreement or contract). This approach may be useful if the parties consider it desirable to ensure that the issues contained in the illustrative list in particular will be governed by the chosen law.

22. [21] Under the private international law of some countries a choice-of-law clause may be considered to be an agreement separate from the rest of the contract between the parties. Under those laws, the choice-of-law clause may remain valid even if the rest of the contract is invalid, unless the grounds for invalidity also extend to the choice-of-law clause. Where the contract is invalid but the choice-of-law clause remains valid, the formation, the lack of validity, and consequences of the invalidity of the contract will be governed by the chosen law.

23. [22] Under most systems of private international law the chosen law may govern the prescription of rights, while under some systems rules relating to prescription (limitation of actions) are of a procedural character and cannot be chosen by the parties in their contract; in those cases the procedural rules of the place where the legal proceedings are brought will apply. The Convention on the Limitation Period in the International Sale of Goods (New York, 1974) as amended by the Protocol of 1980 provides in its article 3 that, unless the Convention provides otherwise, the Convention applies irrespective of the law which would otherwise be applicable by virtue of the rules of private international law. As discussed above in paragraph 6, it may be uncertain whether countertrade agreements committing the parties to the future conclusion of a sales contract fall within the scope of application of the United Nations Convention on Contracts for the International Sale of

Goods. Similarly, it may be uncertain whether such countertrade agreements fall within the scope of application of the Convention on the Limitation Period in the International Sale of Goods.

24. [23] The parties may include in the countertrade agreement a choice-of-law clause that will designate the applicable law not only for the countertrade agreement but also for the future supply contracts to be concluded pursuant to the countertrade agreement. In this way the parties may settle in the countertrade agreement an issue that they would otherwise address in each supply contract.

C. Choosing the same or different national laws to govern countertrade agreement and supply contracts [title changed]

25. [24] In making an express choice of the applicable law, the parties may wish to consider whether the countertrade agreement and any future supply contracts to be concluded in one direction or in both directions pursuant to that countertrade agreement should be made subject to a single national law or to different national laws. The application of a single national law may be desirable when the countertrade agreement stipulates terms of the future supply contracts and the parties wish to ensure that the legal meaning of terms stipulated in the countertrade agreement would remain the same when those terms are subsequently incorporated in a supply contract. Consistency of legal meaning may be desirable in particular with regard to terms concerning payment mechanisms (see chapter IX, "Payment", paragraph [16]), quality of the goods, and terms of delivery.

26. [25] If the parties have structured their obligations in such a way that their obligations arising from the supply contracts in the two directions are interrelated to a high degree, they may find it appropriate to subject all their mutual rights and obligations to a single national law. The obligations of the parties are closely interrelated, in particular, in barter transactions (see chapter III, "Contracting approach", paragraphs 3 to 8) and in direct offset transactions (see chapter II, "Scope and terminology of Legal Guide", paragraph 17). The application of more than one national law to such transactions may lead to inconsistency between obligations of the parties.

27. [26] In the case of counter-purchase, buy-back and indirect offset transactions, the obligations of the parties arising, on the one hand, under the supply contract in one direction (export contract) and, on the other hand, under the countertrade agreement and the supply contract in the other direction (counter-export contract) are usually not interrelated to the same degree as the obligations are interrelated in barter or direct offset transactions. In these cases, no generally valid advice can be given as to whether it would be preferable for the parties to subject their obligations to one national law or to different national laws. In some of these cases, the parties may wish to subject all their obligations to one law. They may wish to do so since it may be simpler to administer the countertrade transaction and to obtain the necessary legal advice with a view to a single national law rather than to have to take into account more than one national law. There may, however, be situations in which the parties decide to subject the export contract to one law and the counter-export contract to another law. The parties might choose different laws when, on the one hand, there are special

reasons for making one of the contracts subject to the law of a particular State and, on the other hand, the parties do not wish to subject the entire transaction to that law. Such special reasons concerning one of the contracts may be, for example, mandatory rules of a State of a party requiring certain types of contracts to be subject to the laws of that State, trade practice according to which one of the contracts is traditionally made subject to a particular national law, or the conclusion of the contracts by different sets of parties. If the parties decide to subject the supply of goods in the two directions to different national laws, the parties may wish to consider, as noted above in paragraph 25, to subject the countertrade agreement and the supply contract to be concluded pursuant to it to the same law.

28. [27] When the party originally committed to purchase engages a third party to fulfil that commitment, the party originally committed and the third party may wish to subject the contract by which the third party is engaged to the law governing the countertrade agreement. Such a choice would help to ensure that terms found both in the countertrade agreement and the contract engaging the third party would be given the same meaning. (The need for coordination between the contract engaging a third party and the countertrade agreement is discussed in chapter VIII, "Participation of third parties", paragraphs [22] to [25]. Certain other aspects of the law applicable to participation by third parties are mentioned in paragraphs [7], [9], [13] and [16] of chapter VIII.)

29. [28] When the countertrade agreement is incorporated in an export contract (see chapter III, "Contracting approach", paragraph 17), a choice-of-law clause in the export contract would, absent a contrary provision, cover the clauses making up the countertrade agreement.

D. Mandatory legal rules of public nature

30. [29] In addition to the applicable law, mandatory rules of an administrative or other public nature in force in the countries of the parties and in other countries (e.g., the country of a third-party purchaser or of a third-party supplier or the country in which the proceeds of the supply in one direction are being held) may affect certain aspects of the countertrade transaction. These mandatory rules may be addressed to residents or citizens of the State that issued the rules, or to certain business activities being carried out or having an effect in the territory of the State. They may be enforced primarily by administrative officials. Their purpose is to ensure compliance with the economic, social, financial or foreign policy of the State. The parties should take these mandatory rules into account in drafting the countertrade agreement and the supply contracts. (Mandatory governmental regulations are also discussed in chapter II, "Scope and terminology of legal guide", paragraphs 9 and 10.)

31. [30] Such rules may be of a general nature, applicable to various types of commercial transactions, or they may be specific to countertrade. Rules of a general nature often relate to safety requirements, environmental protection, health and labour conditions, consumer protection, employment of local personnel, restrictive business practices (see chapter X, "Restrictions on resale of countertrade goods", paragraph 3), customs duties, taxes, and restrictions on exports, imports, transfer of technology and payment of foreign exchange.

32. [31] Mandatory rules specific to countertrade may provide, for example, that: (a) specified types of countertrade transactions require governmental approval; (b) importing of certain types of goods may be carried out only within the framework of specified forms of countertrade; (c) only certain types of goods are permitted to be offered in a countertrade transaction (see chapter VI, "Type, quality and quantity of goods", paragraphs 3 and 40); (d) goods purchased in fulfilment of a countertrade commitment must meet origin requirements (see chapter VI, paragraph 4, and chapter IV, "Countertrade commitment", paragraph 26); (e) evidence accounts are permitted to be used only under specified conditions (see chapter IV, "Countertrade commitment", paragraph 69); (f) the purchase of certain types of goods is to be credited toward the fulfilment of the countertrade commitment at specified rates (see chapter IV, "Countertrade commitment", paragraphs 31 to 34); (g) prior governmental authorization is required for linked payment arrangements restricting foreign currency payments into the country (see chapter IX, "Payment", paragraphs [5] and [18]); (h) specified financial institutions must be used for payment (see chapter IX, paragraphs [24] and [37]).

33. [32] The parties may wish to address in the countertrade agreement the possibility that fulfilment of the countertrade commitment would be impeded by the promulgation or modification of a mandatory rule after the conclusion of the countertrade agreement. Such clauses are discussed in chapter XIII, "Failure to complete countertrade transaction", section D.

UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CN.9/362/Add.15
13 March 1992

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW
Twenty-fifth session
New York, 4 - 22 May 1992

INTERNATIONAL COUNTERTRADE

Draft Legal Guide on International Countertrade Transactions

Report of the Secretary-General

Addendum

XV. SETTLEMENT OF DISPUTES

Contents

	Paragraphs
A. General remarks	1-7
B. Negotiation	8-11
C. Conciliation	12-15
D. Arbitration	16-41
1. Scope of arbitration agreement and mandate of arbitral tribunal	18-23
2. Type of arbitration and appropriate procedural rules	24-30
3. Number of arbitrators	31-33
4. Appointment of arbitrators	34
5. Place of arbitration	35-39
6. Language of proceedings	40-41
E. Judicial proceedings	42-45
F. Multi-contract and multi-party dispute settlement	46-53

8179T V.92-52005

[Editorial note: The present draft chapter is a revision of draft chapter XV, "Settlement of disputes", published as document A/CN.9/WG.IV/WP.51/Add.6. The note in square brackets at the beginning of each paragraph indicates either the number under which the paragraph appeared in document A/CN.9/WG.IV/WP.51/Add.6 or that the paragraph is new. The revisions of paragraphs that appeared in document A/CN.9/WG.IV/WP.51/Add.6 are underlined. An asterisk indicates the place where text has been deleted without adding new language.]

A. General remarks

1. [1] Disputes may arise in a countertrade transaction with respect to the countertrade agreement, and with respect to the supply contracts concluded pursuant to the countertrade agreement. It is advisable that the parties agree on the manner in which any future disputes arising out of the countertrade agreement and the related supply contracts are to be settled.

2. [2] In general, it is desirable for the parties initially to attempt to settle their disputes through negotiation (section B). If negotiation is not successful, the parties might wish to refer their dispute to an independent conciliator, who is to make recommendations to the parties on how to settle the dispute (section C). If those methods of dispute settlement fail, there are basically two methods available of obtaining a binding decision: arbitration and judicial proceedings. Arbitration is a process by which parties refer disputes that might arise between them or that have already arisen for decision by an arbitral tribunal composed of one or more impartial persons (arbitrators) selected by them (section D). Arbitral proceedings may be initiated only on the basis of an arbitration agreement. In general, the parties are obligated to accept the decision of the arbitral tribunal (arbitral award) as final and binding. The arbitral award is usually enforceable in a manner similar to a court decision. In the absence of an arbitration agreement, disputes between the parties will have to be settled in judicial proceedings (section E).

3. [3] This chapter does not deal with procedures agreed upon by the parties for determining terms of a supply contract that have been left open in the countertrade agreement. Such methods include procedures to be observed by the parties in negotiating supply contract terms, standards and guidelines to be used in setting the terms, designation of a third person to determine a contract term, or authorizing one of the parties to determine a contract term within agreed parameters. Such methods are discussed generally in chapter IV, "Countertrade commitment", paragraphs 38 to 60, and with respect to specific types of contract terms in chapter VI, "Type, quality and quantity of goods", paragraphs 25, 26, 34, 39, and chapter VII, "Pricing of goods", paragraphs 11 to 47.

4. [4] The implementation of a countertrade transaction usually includes ongoing discussions between the parties that may permit many problems and misunderstandings to be resolved without recourse to dispute settlement proceedings. If such discussions result in an amendment of the countertrade agreement or of a supply contract, it is advisable to express the agreement in writing (see chapter V, "General remarks on drafting", paragraphs 3 to 5).

5. [5] When the parties embody all of their contractual obligations in the two directions in a single contract (see chapter III, "Contracting approach", paragraphs 2 to 10), a broadly worded dispute settlement clause in that contract would, in the absence of a contrary provision, govern all disputes arising from the contract. However, usually the parties embody their obligations in the two directions in more than one contract (see chapter III, paragraphs 11 to 23). In multi-contract countertrade transactions, the parties may consider it useful to agree that all of the supply contracts, a contract by which a third party is engaged to purchase or to supply goods, as well as the countertrade agreement, are subject to one dispute settlement clause.

6. [5] When the countertrade agreement provides for the future conclusion of supply contracts, the parties may stipulate in the countertrade agreement that all of those contracts are to be subject to a particular method of dispute settlement. In this way the countertrade agreement may settle an issue that would otherwise be addressed in each supply contract.

7. [new paragraph] In some States restrictions exist as to the freedom of a State agency or some other entity of the State to conclude an arbitration agreement or to agree to the jurisdiction of a court of a foreign State. The right to enter into such dispute settlement clauses may be limited to certain types of transactions or to transactions with a foreign party, or such clauses may be subject to an authorization. It is advisable for the parties to investigate dispute settlement aspects in such cases in order to be assured that they are free to enter into a binding dispute settlement clause.

B. Negotiation

8. [6] The most satisfactory method of settling a dispute between parties is usually reaching an amicable settlement of the dispute by negotiation between the parties. An amicable settlement may avoid disruption of the business relationship between the parties. In addition, it may save the parties the considerable cost and the greater amount of time that are normally required for the settlement of disputes by other means. Furthermore, negotiation may be a particularly attractive approach in long-term countertrade transactions in which the countertrade agreement indicates the terms of the future supply contracts in a general rather than in a specific manner.

9. [7] Even though the parties may wish to attempt to settle their disputes through negotiation before invoking other means of dispute settlement, it may not be desirable for the dispute settlement clause to prevent a party from resorting to other means of settlement until a period of time allotted for negotiation has expired. If the clause stipulates that other dispute settlement proceedings may not be initiated during the negotiation period, it is advisable to permit a party to initiate other proceedings even before the expiry of that period in certain cases, e.g., where a party states in the course of negotiations that it is not prepared to negotiate any longer, or where the initiation of arbitral or judicial proceedings before the expiry of the negotiation period is needed in order to prevent the loss or prescription of a right. It is advisable to require a settlement reached through negotiation to be reduced to writing.

10. [8] Since the outcome of a dispute between two parties to a countertrade transaction might affect the interests of another party to the countertrade transaction, it might be agreed that the party not directly involved in a dispute should be permitted to participate in the negotiations. Such a situation may arise when a third party is engaged to purchase countertrade goods and the dispute occurs between the third party and the supplier. In this case the party originally committed to purchase goods may be liable for payment of an agreed sum in the event that the intended purchase by the third party fails to take place and the countertrade commitment is not fulfilled. Similarly, a party committed to supply who engages a third-party supplier may have an interest in the outcome of the dispute between the third-party supplier and the purchaser. The right to such participation in the negotiation of a settlement may be limited to the case in which the party that engages the third party remains liable for the fulfilment of the countertrade commitment. In the case of a multi-party countertrade transaction, it may be agreed that all parties to the transaction would participate in the negotiations.

11. [9] In long-term countertrade transactions, the parties may establish a joint committee to coordinate and monitor implementation of the countertrade transaction (see chapter IV, "Countertrade commitment", paragraph 64). Such a committee may permit the parties to detect possible sources of difficulties and disputes at an early stage and may be an appropriate vehicle for settling disputes through negotiation.

C. Conciliation

12. [10] If the parties fail to settle a dispute through negotiation, they may wish to attempt to do so through conciliation before resorting to arbitral or judicial proceedings. The object of conciliation is to achieve an amicable settlement of the dispute with the assistance of a neutral conciliator respected by both parties. In contrast to an arbitrator or judge, the conciliator does not decide a dispute; rather, the conciliator assists the parties in reaching an agreed settlement, often by proposing solutions for their consideration.

13. [11] Conciliation is non-adversarial and confidential. The parties are more likely to preserve the good business relationship that exists between them than in arbitral or judicial proceedings. Conciliation may even improve the relationship between the parties, since the scope of the conciliation and the ultimate agreement of the parties may go beyond the strict confines of the dispute that gave rise to the conciliation. Conciliation may also permit the participation in the settlement of the dispute of parties that are not directly involved in the dispute but who have an interest in the outcome of the dispute. On the other hand, a potential disadvantage of conciliation is that, if the conciliation were to fail, the money and time spent on it would be wasted. * It is advisable that, before initiating conciliation, the parties consider carefully whether there exists a real likelihood of reaching a settlement.

14. [12] If the parties provide for conciliation, they will have to settle a number of issues for the conciliation to be effective. It is not feasible to settle all of those issues in the body of the countertrade agreement; rather, the parties may incorporate into their agreement by

reference a set of conciliation rules prepared by an international organization, such as the UNCITRAL Conciliation Rules. 1/

15. [13] It is often advisable to commence conciliation proceedings before resorting to arbitral or judicial proceedings. If during conciliation proceedings arbitral or judicial proceedings have been initiated, the parties might still find it useful to continue with the conciliation. Conciliation may also be initiated after the commencement of arbitral or judicial proceedings.

D. Arbitration

16. [14] There are various reasons why arbitration is frequently used for settling disputes arising in countertrade transactions. Arbitral proceedings may be structured by the parties so as to be less formal than judicial proceedings and better suited to the needs of the parties and to the specific features of the disputes likely to arise under the countertrade agreement or a related contract. The parties can choose as arbitrators persons who have expert knowledge of the subject-matter in dispute. The parties may choose the place where the arbitral proceedings are to be conducted. They may also choose the language or languages to be used in the arbitral proceedings. In addition, the parties can choose the applicable law, and that choice will almost always be respected by the arbitral tribunal; the same is not always true of judicial proceedings (see chapter XIV, "Choice of law", paragraph 12). Where parties agree to arbitration, neither party submits to the courts of the country of the other party. Arbitral proceedings may be less disruptive of business relations between the parties than judicial proceedings. The proceedings and arbitral awards can be kept confidential, while judicial proceedings and decisions usually cannot. Arbitral proceedings tend to be more expeditious and may be less costly than judicial proceedings. It may be noted, however, that some States provide for summary judicial proceedings for disputes involving a sum of money that does not exceed a certain amount. Under some national laws, an arbitral tribunal may have more latitude than a court to grant to the claimant the remedy of specific performance. Finally, as a result of international conventions that assist in the recognition and enforcement of foreign arbitral awards, those awards are frequently recognized and enforced more easily than foreign judicial decisions. One such convention to which many States are parties is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). 2/

17. [15] On the other hand, an arbitral award may be set aside in judicial proceedings. The initiation of those proceedings will delay the final settlement of the dispute. However, under many legal systems, an arbitral award may be set aside only on a limited number of grounds, for example that the arbitral tribunal lacked authority to decide the dispute, that a party could not present its case in the arbitral proceedings, that the rules applicable to the appointment of arbitrators or to the arbitral procedure were not complied with, or that the award was contrary to public policy. It may also be noted that, in some States, it is not possible for parties to preclude courts from settling certain types of disputes. In addition, a court may award and enforce to a broader extent than an arbitral tribunal provisional measures of protection or injunctions.

1. Scope of arbitration agreement and mandate of arbitral tribunal

18. [16] In general, arbitral proceedings may be conducted only on the basis of an agreement by the parties to arbitrate. The agreement may be reflected either in an arbitration clause included in the countertrade agreement or a related contract, or in a separate arbitration agreement concluded by the parties before or after a dispute has arisen. Since it may be more difficult to reach an agreement to arbitrate after a dispute has arisen, it is advisable to enter into an arbitration agreement at the outset of the countertrade transaction. However, under some legal systems, an agreement to arbitrate is procedurally and substantively effective only if it is concluded or confirmed after a dispute has arisen.

19. [17] The arbitration agreement should indicate what disputes are to be settled by arbitration. For example, the arbitration clause may stipulate that all disputes arising out of or relating to the countertrade agreement or the breach, termination or invalidity thereof are to be settled by arbitration. In some cases, the parties may wish to exclude from that wide grant of jurisdiction certain disputes that they do not wish to be settled by arbitration.

20. [18] If permitted under the law applicable to the arbitral proceedings, the parties may wish to authorize the arbitral tribunal to order interim measures pending the final settlement of a dispute. However, under some legal systems arbitral tribunals are not empowered to order interim measures. Under other legal systems where interim measures of protection can be ordered by an arbitral tribunal, they cannot be enforced; in those cases it may be preferable for the parties to rely on a court to order interim measures. Under many legal systems a court may order interim measures even if the dispute is to be or has been submitted to arbitration.

21. [19] It is desirable for the arbitration agreement to obligate the parties to implement arbitral decisions, including decisions ordering interim measures. The advantage of including such an obligation in the agreement is that under some legal systems, where an arbitral award is not enforceable in the country of a party, a failure by the party to implement an award when obligated to do so by the agreement might be treated in judicial proceedings as a failure by the party to perform a contractual obligation.

22. [20] If judicial proceedings are instituted in respect of a dispute that is covered by a valid arbitration agreement, upon a timely request the court will normally refer the dispute to arbitration. However, the court may retain the authority to order interim measures and will normally be entitled to control certain aspects of arbitral proceedings (e.g., to decide on a challenge to arbitrators) and to set aside arbitral awards on certain grounds (see above, paragraph 17).

23. [21] Parties that are considering authorizing the arbitral tribunal to decide disputes ex aequo et bono or to act as amiable compositeur should bear in mind that arbitrators are not permitted to do so under some legal systems. In addition, such authorizations may be interpreted in different ways and lead to legal insecurity. For example, the terms might be interpreted as authorizing the arbitral tribunal to be guided either only by principles of fairness, justice or equity, or, in addition, by those provisions of the applicable law regarded in the legal system of that law as

fundamental. If the parties wish to authorize the arbitral tribunal to decide disputes without applying all legal rules of a State, they may wish to specify the standards or rules according to which the arbitral tribunal is to decide the substance of the dispute. Moreover, in order to avoid any misunderstanding, the parties may wish to make it clear that the arbitral tribunal is to decide in accordance with the terms of the supply contract or the countertrade agreement and the relevant usages of trade applicable to the transaction.

2. Type of arbitration and appropriate procedural rules

24. [22] The parties are able to select the type of arbitration that best suits their needs. It is desirable that they agree on appropriate rules to govern their arbitral proceedings. There is a wide range of arbitration systems available, with varying degrees of involvement of permanent bodies (e.g., arbitration institutions, courts of arbitration, professional or trade associations and chambers of commerce) or third persons (e.g., presidents of courts of arbitration or of chambers of commerce). At one end of the spectrum is the pure ad hoc type of arbitration, which does not involve a permanent body or third person in any way. This means, in practical terms, that no outside help is available (except, perhaps, from a national court) if, for example, difficulties are encountered in the appointment or challenge of an arbitrator. Moreover, any necessary administrative arrangements have to be made by the parties or the arbitrators themselves. At the other end of the spectrum there are arbitrations fully administered and supervised by a permanent body, which may review terms of reference and the draft award and may revise the form of the award and make recommendations as to its substance.

25. [23] Between these two types of arbitration there is a considerable variety of arbitration systems, all of which involve an appointing authority but differ as to the administrative services that they provide. The essential, although not necessarily exclusive, function of an appointing authority is to compose or assist in composing the arbitral tribunal (e.g., by appointing the arbitrators, deciding on challenges of an arbitrator or replacing an arbitrator). Administrative or logistical services, which may be offered as a package or separately, could include the following: forwarding written communications of a party or the arbitrators; assisting the arbitral tribunal in establishing and notifying the date, time and place of hearings and other meetings; providing, or arranging for, meeting rooms for hearings or deliberations of the arbitral tribunal; arranging for stenographic transcripts of hearings and for interpretation during hearings and possibly translation of documents; assisting in filing or registering the arbitral award, when required; holding deposits and administering accounts relating to fees and expenses; and providing other secretarial or clerical assistance.

26. [24] Unless the parties opt for pure ad hoc arbitration, they may wish to agree on the body or person to perform the functions that they require. Among the factors worthwhile considering in selecting an appropriate body or person are the following: willingness to perform the required functions; competence, in particular in respect of international matters; appropriateness of fees measured against the extent of services requested; seat or residence of the body or person and possible restriction of its services to a particular geographic area. The latter point should be viewed in conjunction with the probable or agreed place of arbitration (see below, paragraphs 35 to 39). However, certain functions (e.g., appointment) need not

necessarily be performed at the place of arbitration, and certain arbitral institutions are prepared to provide services in countries other than those where they are located.

27. [25] In most cases, the arbitral proceedings will be governed by the procedural law of the State where the proceedings take place. Many States have laws regulating various aspects of arbitral proceedings. Some provisions of these laws are mandatory; others are non-mandatory. In selecting the place of arbitration, the parties may wish to consider the extent to which the law of a place under consideration recognizes the special needs and features of international commercial arbitration and, in particular, whether it is sufficiently liberal to allow the parties to tailor the procedural rules to meet their particular needs and wishes while at the same time ensuring that the proceedings are fair and efficient. A recent trend in this direction, discernible from modern legislation in some States, is being enhanced and fortified by the UNCITRAL Model Law on International Commercial Arbitration. 3/ The UNCITRAL Model Law is becoming increasingly accepted by States of different regions and different legal and economic systems.

28. [26] Since the procedural rules in the arbitration laws of some States are not necessarily suited to the particular features and needs of international commercial arbitration, and since, in any case, those laws do not contain rules settling all procedural questions that may arise in relation to arbitral proceedings, the parties may wish to adopt a set of arbitration rules to govern arbitral proceedings under their agreement. When the parties choose to have their arbitrations administered by an institution, the institution may require the parties to use the rules of that institution, and may refuse to administer a case if the parties have modified provisions of those rules that the institution regards as fundamental to its arbitration system. Most arbitral institutions, however, offer a choice of two or sometimes more sets of rules and often allow the parties to modify any of the rules. If the parties are not required by an institution to use a particular set of arbitration rules or to choose among specified sets of rules, or if they choose ad hoc arbitration, they are free to choose a set of rules themselves. In selecting a set of procedural rules, the parties may wish to consider its suitability for international cases and the acceptability of the procedures contained in them.

29. [27] Of the many arbitration rules promulgated by international organizations or arbitral institutions, the UNCITRAL Arbitration Rules 4/ deserve particular mention. These Rules have proven to be acceptable in the various legal and economic systems and are widely known and used in all parts of the world. Parties may use them in pure ad hoc arbitrations as well as in arbitrations involving an appointing authority with or without the provision of additional administrative services. A considerable number of arbitration institutions in all regions of the world have either adopted these Rules as their own institutional rules for international cases or have offered to act as appointing authority in conjunction with the use of those Rules. Most of them will provide administrative services in cases conducted under the UNCITRAL Arbitration Rules.

30. [28] Where a model clause accompanies the arbitration rules to govern arbitrations under the countertrade agreement or is suggested by an arbitral institution, adoption of that clause by the parties may help to enhance the certainty and effectiveness of the arbitration agreement. Some model clauses, such as the one accompanying the UNCITRAL Arbitration Rules, invite the

parties to settle certain practical matters by agreement. These include the involvement of an appointing authority, as well as the number of arbitrators (see below, paragraphs 31 to 33), the appointment of arbitrators (see below, paragraph 34), the place of arbitration (see below, paragraphs 35 to 39) and the language or languages to be used in the arbitral proceedings (see below, paragraphs 40 and 41). 5/ [new footnote]

3. Number of arbitrators

31. [29] The parties may wish to specify in the arbitration clause the number of arbitrators who are to comprise the arbitral tribunal. If the parties fail to do so, the chosen arbitration rules or, in some cases, the law applicable to the arbitral proceedings will either specify that number or the manner by which it is to be determined. Agreement by the parties on the number of arbitrators will enable the parties to ensure that the number conforms to their particular needs and wishes, and will provide certainty in respect of that aspect of the appointment process. However, parties should be aware that some national laws restrict their freedom to agree upon the number of arbitrators by, for example, prohibiting an even number of arbitrators.

32. [30] Other than the possible legal restriction just referred to, the considerations that may be relevant to the question of the number of arbitrators are essentially of a practical nature. In order to ensure the efficient functioning of the arbitral proceedings and the taking of decisions, it is usually desirable to specify an uneven number, i.e., one or three, although in practice parties sometimes specify two-member panels, coupled with a mechanism for involving a third arbitrator, "umpire" or "referee", to overcome any impasse between the two.

33. [31] As to whether one or three arbitrators should be specified, the parties may wish to consider that arbitral proceedings conducted by a sole arbitrator are generally less costly and tend to be more expeditious than proceedings where the fees of three arbitrators have to be paid and where three time-schedules have to be accommodated. On the other hand, three arbitrators may bring a wider range of expertise and background to the proceedings. Since the desirable expertise and background can be of different types, different methods of appointing the arbitrators may be envisaged.

4. Appointment of arbitrators

34. [32] On the one hand, in an international case, each party may want to have one arbitrator of its choice who would be familiar with the economic and legal environment in which that party operates. Therefore, the parties might agree on a method by which each party appoints one arbitrator and the third arbitrator is chosen by the two thus appointed or by an appointing authority. On the other hand, in complex disputes involving legal, technical and economic issues, it may be of considerable advantage to have arbitrators with different qualifications and expertise in the relevant fields. Where parties attach particular importance to this aspect, they may wish to entrust an appointing authority with the appointment of all three arbitrators and, possibly, specify the qualifications or expertise required of the arbitrators.

5. Place of arbitration

35. [33] The parties may wish to specify in the arbitration agreement the place where the proceedings are to be held and where the arbitral award is to be issued. The selection of an appropriate place of arbitration may be crucial to the functioning of the arbitral process and to the enforceability of the arbitral award. The following considerations may be relevant to the selection of the place of arbitration.

36. [34] Firstly, the parties may consider it desirable to choose a place of arbitration such that an award issued in that place would be enforceable in the countries where the parties have their places of business or substantial assets. In many States, foreign awards are readily enforceable only by virtue of multilateral or bilateral treaties, and often only on the basis of reciprocity. In some States enforcement is available on the basis of legislation providing for the reciprocal enforcement of awards made in certain other States. The parties may thus wish to choose a place of arbitration in a State that is in such a treaty relationship, or has reciprocal legislative arrangements, with the States where enforcement might later be sought.

37. [35] Secondly, the parties may consider it desirable to choose a place where the arbitration law provides a suitable legal framework for international cases. Some arbitration laws might be inappropriate because, for example, they unduly restrict the autonomy of the parties or fail to provide a comprehensive procedural framework to ensure efficient and fair proceedings.

38. [36] Considerations of a more practical nature include the following: the convenience of the parties and other persons involved in the proceedings; the availability of necessary facilities, including meeting rooms, support services and communication facilities; the availability of administrative services of an arbitral institution or chamber of commerce, if so desired by the parties; relevant costs and expenses, including expenses for travel, accommodation, meeting rooms and support services; the ability of the parties' counsel to represent the parties without the need to retain local lawyers. Another relevant consideration is that it may be advantageous for the arbitral proceedings to be held in a place which is near to the subject-matter in dispute.

39. [37] Yet other considerations often lead parties to agree on a place other than in the States where they have their places of business. For example, the parties may select a third State because each party may have misgivings about arbitrating in the other party's country; a party in whose State the proceedings are conducted might be thought by the other party to benefit from a familiar legal and psychological environment and from other circumstances facilitating the presentation of the case.

6. Language of proceedings

40. [38] The parties may also wish to specify the language to be used in the arbitral proceedings. The choice of the language may influence the efficiency with which the proceedings are conducted and the cost of the proceedings. Whenever possible, it is desirable to specify a single language, such as the language in which the documents related to the transaction are written. When more than one language is specified, the costs of translation

and interpretation from one language to the other are usually considered to be part of the costs of arbitration and apportioned in the same way as the other costs of arbitration.

41. [39] The parties may wish to specify the types of documents or communications that must be submitted in or translated into the specified language. They may, for example, require the written pleadings, oral testimony at a hearing, and any award, decision or other communication of the arbitral tribunal to be in the specified language. The tribunal may be given the discretion to decide whether and to what extent documentary evidence should be translated. Such discretion may be appropriate in view of the fact that documents submitted by the parties may be voluminous and that only a part of a document may be relevant to a dispute.

E. Judicial proceedings

42. [40] Disputes that are not settled through negotiation or conciliation will, if the parties do not agree to arbitration, have to be settled in judicial proceedings. Courts of two or more countries may be competent to decide a given dispute between the parties, and in some cases the manner in which a dispute is decided depends upon which court decides the dispute. For example, the validity and effect of a choice by the parties of the applicable law will depend upon the rules of private international law in the country of the court deciding the dispute (see chapter XIV, "Choice of law", paragraph 12).

43. [41] The uncertainties that arise when more than one court is competent to decide a dispute may be reduced by an exclusive jurisdiction clause, obligating the parties to submit disputes that arise between them to a specified court in a specified place in a specified country. However, the parties should bear in mind that, under many legal systems, a clause conferring exclusive jurisdiction on a court is valid only if the selected court would, in the absence of the choice-of-jurisdiction clause, have authority to decide the type of dispute that is submitted to it under the clause. Therefore, in selecting a court, the parties should ascertain that the court is legally competent to decide the types of disputes that are to be submitted to it. It is advisable for the clause to specify a court in the selected country, rather than to refer simply to "a competent court" in that country, in order to avoid questions as to which court was to decide a given dispute. The clause may stipulate the types of disputes that are subject to it in a manner similar to the specification in an arbitration agreement (see above, paragraph 19).

44. [42] In referring disputes to the courts of a particular State, the parties should bear in mind the extent to which a judicial decision made in that State would be enforceable in the countries of the parties, or in any other country in which enforcement may be sought (see above, paragraph 36).

45. [43] While an exclusive jurisdiction clause may reduce uncertainties with respect to matters such as the applicable law and the enforceability of a decision, and may facilitate the multi-party settlement of disputes (see below, paragraphs 50 to 53), it may also have certain disadvantages. If a court in the country of one of the parties is given exclusive jurisdiction, and the exclusive jurisdiction clause is invalid under the law of the country

of the selected court, but valid under the law of the country of the other party, difficulties may arise in initiating judicial proceedings in either of the countries. Difficulties connected with initiating judicial proceedings may be magnified if the parties confer exclusive jurisdiction on a court in a third country.

F. Multi-contract and multi-party dispute settlement

46. [44] Countertrade transactions often involve several contracts in the two directions, in addition to the countertrade agreement. In such multi-contract transactions, the parties may wish to consider whether it would be desirable to agree on a single body for the settlement of all disputes that may arise in the transaction, i.e., the same conciliator, arbitral tribunal or court. If disputes are to be settled judicially, the parties may wish to confer exclusive jurisdiction on a particular court (see above, paragraphs 43 to 45). If the parties opt for arbitration or conciliation, they may wish to agree that the arbitral tribunal or conciliator appointed to settle the first dispute that arises will also be appointed to settle any subsequent disputes that may arise in the countertrade transaction.

47. [45] The selection of a single body to settle disputes would be useful when the disputes to be resolved raise similar questions of fact or law. This may promote economy and efficiency in dispute settlement, facilitate consolidation of dispute settlement proceedings, and lessen the possibility of inconsistent decisions. Even if disputes that may arise under the countertrade transaction do not all raise similar questions of law or fact, the selection of a single dispute settlement body may be advantageous because it may allow the parties to reduce the cost of legal advice and facilitate administration of the transaction.

48. [46] There may, however, be circumstances in which the parties agree to the submission of disputes under a given supply contract to a particular dispute settlement body, but decide to submit disputes under other contracts to a different body. Such circumstances may exist, for example, when it is customary in the practice of the parties or in the trade, or it is required by mandatory rules, that a particular supply contract be submitted to a particular dispute settlement method or body, and the parties do not wish to submit the other contracts in the transaction to that same method or body.

49. [47] The possibility of disputes under more than one contract involving similar questions of fact or law may exist in a number of situations. One such situation is when the subject-matter of the supply contracts in one direction is related to the subject-matter of the supply contracts in the other direction. This may be the case in a buy-back transaction in which, for example, a dispute as to the quality of the counter-export goods manufactured by equipment supplied under the export contract is related to a dispute as to the quality of that equipment. Similarly, in a direct offset transaction, in which the goods supplied in one direction are incorporated into the goods supplied in the other direction, a dispute as to the quality or timeliness of delivery of the goods in one direction may be related to a dispute as to the quality or timeliness of delivery of the goods in the other direction. Another situation in which related disputes may arise is when the countertrade agreement establishes a linked payment mechanism through which proceeds generated by the shipment of

goods in one direction are to be used to pay for the shipment of goods in the other direction (see chapter IX, "Payment"). For example, when the importer, in accordance with the countertrade agreement, retains the proceeds of the export contract, a dispute as to the responsibility for a failure to conclude a counter-export contract may lead to a related dispute concerning the transfer of proceeds of the export contract to the exporter. When the countertrade agreement provides for the setoff of payment claims for supply contracts concluded in the two directions, a dispute as to settlement of imbalances may involve questions of fact or law pertaining to supply contracts in either direction. Yet another situation in which related disputes may arise is when the countertrade agreement provides that a problem in the conclusion or performance of supply contracts in one direction is to have an effect on the obligations of the parties with respect to the conclusion or performance of supply contracts in the other direction (see chapter XIII, "Failure to complete countertrade transaction", paragraphs [38] to [60]).

50. [48] Disputes may arise in a countertrade transaction that involve or affect not only the exporter and the importer, but other parties as well, in particular third persons engaged in the transaction as purchasers and suppliers of countertrade goods (see above, paragraph 10). For example, when there is a dispute between the counter-exporter and the party originally committed to purchase as to whether liquidated damages are payable for a failure to purchase goods, a third-party purchaser engaged by the party originally committed to purchase those goods would have an interest in the dispute if a "hold-harmless" clause has been agreed upon between the third-party purchaser and the party originally committed to purchase (see chapter VIII, "Participation of third parties", paragraph [33]). Similarly, the party originally committed to purchase would be interested in the outcome of a dispute between a third-party purchaser and the counter-exporter if the party originally committed to purchase remains liable for the fulfilment of the countertrade commitment despite the engagement of the third-party purchaser. A further example of a multi-party dispute would be when both the party originally committed to purchase and the third-party purchaser are liable to the supplier for the fulfilment of the countertrade commitment and the supplier decides to pursue a claim against both of them.

51. [49] In the types of cases referred to in the preceding paragraph, it may be desirable to settle all related issues in the same dispute settlement proceedings. This could prevent inconsistent decisions, facilitate the taking of evidence, and reduce costs. However, multi-party proceedings tend to be more complicated and less manageable, and a party may find it more difficult to plan and present its case in such proceedings.

52. [49] Many legal systems provide a means for disputes involving several parties to be settled in the same multi-party judicial proceedings. In order to enable disputes involving several parties to be settled in multi-party judicial proceedings, it may be desirable for related contracts to contain a clause conferring exclusive jurisdiction on a court that has the power to conduct multi-party proceedings (see above, paragraphs 43 to 45). *

53. [new paragraph] Multi-party arbitration proceedings are usually possible only if all the participating parties conclude an arbitration agreement submitting their dispute to the same panel of arbitrators. The parties may wish to conclude such a multi-party arbitration agreement at the outset of the transaction, or they may decide to do so after the dispute has

arisen when the matters at issue indicate the usefulness of a multi-party arbitration. In some States, after a dispute has arisen, courts are able to assist the parties to implement the multi-party arbitration agreement by deciding procedural issues on which the parties cannot agree (e.g., the question whether an issue is covered by the multi-party arbitration clause, appointment of a single arbitral tribunal, or determination of the place of arbitration). There are also some States in which courts may, under certain conditions, order consolidation of two or more arbitral proceedings into a single arbitration even if not all the parties involved have agreed on the submission of the dispute to a single panel of arbitrators. However, it may be doubtful whether an award rendered in proceedings consolidated by a court order would be enforceable against a party that had not consented to those proceedings.

Notes

1/ Report of the United Nations Commission on International Trade Law on the work of its thirteenth session (1980), Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17), para. 106 (also reproduced in Yearbook of the United Nations Commission on International Trade Law, vol. XI: 1980, part one, II, A (United Nations publication, Sales No. E.81.V.8)). The UNCITRAL Conciliation Rules have also been reproduced in booklet form (United Nations Publication, Sales No. E.81.V.6). Accompanying the Rules is a model conciliation clause, which reads: "Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force". The use of the UNCITRAL Conciliation Rules has been recommended by the United Nations General Assembly in its resolution 35/52 of 4 December 1980.

2/ United Nations, Treaties Series, vol. 330, p. 38, no. 4739 (1959).

3/ Report of the United Nations Commission on International Trade Law on the work of its eighteenth session (1985), Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17), para. 332 and annex I (also reproduced in Yearbook of the United Nations Commission on International Trade Law, vol. XVI: 1985, part three, I (United Nations publication, Sales No. E.87.V.4)). The United Nations General Assembly, in its resolution 40/72 of 11 December 1985, recommended "that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice".

4/ Report of the United Nations Commission on International Trade Law on the work of its ninth session (1976), Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17), para. 57 (also reproduced in Yearbook of the United Nations Commission on International Trade Law, vol. VII: 1976, part one, II, A (United Nations publication, Sales No. E.77.V.6)). The use of the UNCITRAL Arbitration Rules has been recommended by the United Nations General Assembly in its resolution 31/98 of 15 December 1976.

5/ [new footnote] The following clause is recommended in the UNCITRAL Arbitration Rules: "Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.

Note - Parties may wish to consider adding:

(a) The appointing authority shall be ... (name of institution or person);
(b) The number of arbitrators shall be ... (one or three);
(c) The place of arbitration shall be ... (town or country);
(d) The language(s) to be used in the arbitral proceedings shall be ...".

UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CN.9/362/Add.16
3 April 1992

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW
Twenty-fifth session
New York, 4 - 22 May 1992

INTERNATIONAL COUNTERTRADE

Draft Legal Guide on International Countertrade Transactions

Report of the Secretary-General

Addendum

DRAFT ILLUSTRATIVE PROVISIONS

Contents

		Page
INTRODUCTION		2
DRAFT ILLUSTRATIVE PROVISIONS		
Chapter VI.	Type, quality and quantity of goods	2
Chapter VII.	Pricing of goods	3
Chapter VIII.	Participation of third parties	3
Chapter X.	Restrictions on resale of goods	5
Chapter XI.	Liquidated damages and penalty clauses	5
Chapter XIII.	Failure to complete countertrade transaction	7
Chapter XIV.	Choice of law	8
Chapter XV.	Settlement of disputes	9

8180T
V.92-53025

INTRODUCTION

1. The Working Group on International Payments decided that the Legal Guide should include a limited number of illustrative provisions (A/CN.9/357, paras. 93 and 94). The Working Group expressed support for the selection made in document A/CN.9/WG.IV/WP.51//Add.7* of the issues to which illustrative provisions should be added. The present document contains a revision of illustrative provisions published in document A/CN.9/WG.IV/WP.51//Add.7*.

2. It is suggested that the illustrative provisions be included in the Legal Guide as footnotes.

3. As noted in document A/CN.9/WG.IV/WP.51//Add.7*, paragraph 2, the preparation of the illustrative provisions has been influenced by the following considerations. Firstly, the draft Legal Guide discusses possible contractual solutions in such a way that the reader can derive from the draft chapters guidance to drafting clauses for a countertrade agreement. Secondly, illustrative provisions must of necessity be drafted in a general manner and may therefore not take into account the actual circumstances in a given countertrade transaction. These considerations reduce the number of illustrative provisions that can usefully be added to the Legal Guide.

4. In the Working Group it was suggested that in each illustrative provision reference should be made to the warning set out in chapter I, "Introduction", paragraph 13, that illustrative provisions should not necessarily be regarded as appropriate models for inclusion in individual agreements (A/CN.9/357, para. 93). In order to implement the suggestion, it is proposed that the following title be given to each set of illustrative provisions placed at the end of a given chapter: "Illustrative provisions to chapter .. (care should be taken in using them, see 'Introduction', paragraph 13)".

DRAFT ILLUSTRATIVE PROVISIONS

Chapter VI. TYPE, QUALITY AND QUANTITY OF GOODS

[Editorial note: The following footnote to paragraph 25, except for the underlined modifications, appeared in document A/CN.9/WG.IV/WP.51/Add.7* under the title "Chapter V, Type, quality and quantity of goods, Footnote to paragraph 13."]

Footnote to paragraph 25

Assuming that "Y Company" is committed to purchase goods from "X Company", the clause in the countertrade agreement may contain the following elements:

"When X Company makes, pursuant to the countertrade agreement, an offer for the conclusion of a supply contract, the goods offered for purchase must:

(a) be fit for the purposes for which goods of the same description would ordinarily be used;

(b) be fit for any particular purpose expressly or impliedly made known to X Company at the time of the conclusion of the countertrade agreement;

(c) possess qualities consistent with those of the sample or model presented by X Company to Y Company;

(d) be contained or packaged in the manner usual for such goods or, where no such usual manner has been established, in a manner adequate to preserve and protect the goods."

(The clause is modelled on article 35 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)).

Chapter VII. PRICING OF GOODS

[Editorial note: The following footnote to paragraph 48, except for the underlined addition, appeared in document A/CN.9/WG.IV/WP.51/Add.7* under the title "Chapter VI, Pricing of goods, Footnote to paragraph 37."]

Footnote to paragraph 48

Assuming that the currency of payment is the Austrian Schilling and that the reference currency is the Swiss Franc, the clause may read as follows:

"If, on the date of actual payment, the exchange rate between the Austrian Schilling and the Swiss Franc is at variance from the exchange rate ... [specify exchange rate prevailing at a particular place] as it was on the date of conclusion of the countertrade agreement by more than ... [e.g, five per cent, or some other percentage specified by the parties], the price in Austrian Schillings shall be increased or decreased so that that price, as converted into Swiss Francs, would remain unchanged from the price as expressed in Swiss Francs on the date of conclusion of the countertrade agreement." (It should be noted that the foregoing clause may lead to an unintended and unsuitable result if the applicable exchange rate were to be set by an administrative decision independent of events in the currency market (see paragraph 49)).

Chapter VIII. PARTICIPATION OF THIRD PARTIES

[Editorial note: The following footnotes to paragraphs 12, 18 and 23 are revisions of the footnotes to paragraphs 10, 16 and 21, which appeared in document A/CN.9/WG.IV/WP.51/Add.7* under the title "Chapter VIII, Participation of third parties". The revisions are underlined. The footnote to paragraph 18, third sentence, is new.]

Footnote to paragraph 12

Assuming that "Y Company" is the party originally committed to purchase, the clause may read as follows:

"Y Company is authorized to engage a third-party purchaser to make the purchases necessary to fulfil the countertrade commitment." (To this clause, the parties may add a stipulation discussed in

paragraph 18 indicating whether or not, after the engagement of the third party, the party originally committed continues to be liable for the fulfilment of the countertrade commitment.)

Footnote to paragraph 18, third sentence

[new footnote] Assuming that "Y Company" is the party originally committed to purchase and "X Company" is the supplier, the clause in the countertrade agreement may read as follows:

"The fact that Y Company engages a third party to make the purchases necessary to fulfil the countertrade commitment and that the third party makes a commitment to X Company to make those purchases does not release Y Company from liability for a failure to fulfil the countertrade commitment.

Footnote to paragraph 18, sixth sentence

Assuming that "Y Company" is the party originally committed to purchase, and "X Company" is the supplier, the clause in the countertrade agreement may read as follows:

"Y Company will be released from liability for fulfilment of the countertrade commitment when, upon the engagement of a third-party purchaser by Y Company, the commitment of Y Company to purchase goods from X Company is transferred to the third-party purchaser. [The transfer includes the obligation to pay the liquidated damages in the case of a failure to make the purchases.] For such a transfer to be effective, Y Company, X Company and the third-party purchaser must agree to the transfer."

Footnote to paragraph 18, seventh sentence

Assuming that "Y Company" is the party originally committed to purchase, and "X Company" is the supplier, the clause in the countertrade agreement may read as follows:

"Y Company undertakes to release X Company from liability for fulfilment of the countertrade commitment when, upon the engagement of a third-party purchaser by Y Company, X Company and the third-party purchaser conclude an agreement whereby the third-party assumes a commitment to make the purchases necessary to fulfil the countertrade commitment of Y Company."

If the foregoing provision is included in the countertrade agreement, the actual release of X Company from liability for fulfilment of the countertrade commitment can be expressed in the following form:

"X Company, having agreed with Z Company (third-party purchaser) that Z Company assumes the commitment to make the purchases necessary to fulfil the countertrade commitment of Y Company, consents to the release of Y Company from the liability for the fulfilment of the countertrade commitment. The release of Y Company becomes effective when the agreement between X Company and Z Company becomes effective."

Footnote to paragraph 23

Assuming that "Z Company" is the third-party purchaser, "Y Company" is the party originally committed to purchase, and "X Company" is the supplier, the clause in the contract between Y Company and Z Company may read as follows:

"Z Company shall conclude with X Company an agreement in which Z Company will agree to make the purchases necessary to fulfil the countertrade commitment set forth in the countertrade agreement between Y Company and X Company, a copy of which is attached to this contract. Z Company agrees to be bound by all the terms and conditions of that countertrade agreement, and in particular Z Company agrees to pay the liquidated damages stipulated in the countertrade agreement in the event Z Company fails to make the purchases necessary to fulfil the countertrade commitment."

Chapter X. RESTRICTIONS ON RESALE OF GOODS

[Editorial note: The following footnote to paragraph 10 appeared in document A/CN.9/WG.IV/WP.51/Add.7* under the title "Chapter X. Restrictions on resale of goods, Footnote to paragraph 9." No substantive change to the text of the footnote has been made.]

Footnote to paragraph 10

Assuming that "Y Company" is the party purchasing goods pursuant to the countertrade agreement and that "X Company" is the supplier, the clause may read as follows:

"Y Company must inform X Company

[alternative A:] of the resale of those goods; the information shall be given within ... days after the conclusion of the resale contract.

[alternative B:] of the negotiations for the resale of the countertrade goods; Y Company shall give X Company [... days] [sufficient time] to make any observations or suggestions on the intended resale, and Y Company shall refrain from concluding the resale contract under negotiation before the expiry of that time period.

The information to be given must indicate ... [include some or all of the following: country, region within a country, or city to which the countertrade goods are to be shipped; place of business of the person to whom the goods are being resold; resale price; whether the countertrade goods have been re-marked or repackaged prior to resale and, if so, what packaging or marking has been used.]"

Chapter XI. LIQUIDATED DAMAGES AND PENALTY CLAUSES

[Editorial note: The following footnotes to paragraphs 6, 12 and 26 of draft chapter XI appeared in document A/CN.9/WG.IV/WP.51/Add.7* under the title "Chapter XI. Liquidated damages and penalty clauses" as footnotes to paragraphs 5, 12 and 22. The modifications of the footnotes are underlined].

Footnote to paragraph 6

Assuming that "X Company" is the supplier, "Y Company" is the party committed to purchase, and the Austrian Schilling is the currency of payment, the clause may read as follows:

[For failure to purchase goods]

"(1) If Y Company fails to make the purchases necessary to fulfil the countertrade commitment before the expiry of the period stipulated for the fulfilment of the countertrade commitment, Y Company will be obligated to pay to X Company an amount in Austrian Schillings equivalent to ... per cent of the unfulfilled portion of the countertrade commitment. Upon payment of that amount, Y Company will be released from the portion of the unfulfilled countertrade commitment for which the agreed sum was claimed.

(2) To the extent that the failure by Y Company results from a failure by X Company to make goods available in conformity with this countertrade agreement, paragraph (1) will not apply."

[For failure to supply goods]

"(1) If X Company fails to make the goods available for the fulfilment of the countertrade commitment before the expiry of the period stipulated for the fulfilment of the countertrade commitment, X Company will be obligated to pay to Y Company an amount in Austrian Schillings equivalent to ... per cent of the unfulfilled portion of the countertrade commitment. Upon payment of that amount, X Company will be released from the portion of the unfulfilled countertrade commitment for which the agreed sum was claimed.

(2) To the extent that the failure by X Company results from a failure by Y Company to fulfil its obligations under this countertrade agreement, paragraph (1) will not apply."

Footnote to paragraph 12 (provision that could be added to any liquidated damages or penalty clause)

"No damages are recoverable in addition to the agreed sum for the failure for which the agreed sum is payable."

Footnote to paragraph 26 (provision that could be added to any liquidated damages or penalty clause)

Assuming that "X Company" is the beneficiary of the clause and "Y Company" is the party obligated to pay the agreed sum, the stipulation may read as follows:

"If payment of the agreed sum becomes due in accordance with paragraph (1), X Company has the right to deduct the agreed sum from funds of Y Company held by X Company or to set off the claim for the agreed sum against a countervailing claim by Y Company against X Company. [A deduction or setoff is permitted only if the funds held by X Company, or the claim by Y Company, arise from the following contracts ...]"

Chapter XIII. FAILURE TO COMPLETE COUNTERTRADE TRANSACTION

[Editorial note: The following footnotes to paragraphs 7, 21, 23, 44 and 50 appeared in document A/CN.9/WG.IV/WP.51/Add.7* under the title "Chapter XIII. Failure to complete countertrade transaction" as footnotes to paragraphs 6, 22, 24, 43 and 49. Slight editorial changes are underlined.]

Footnote to paragraph 7

Assuming that "Y Company" is the party committed to purchase and that "X Company" is the supplier, the clause may read as follows:

> "If X Company fails to accept a purchase order made by Y Company in accordance with this countertrade agreement [or a purchase order made by a third-party purchaser engaged by Y Company pursuant to this countertrade agreement], Y Company is entitled to declare the amount of the outstanding countertrade commitment reduced by the amount of the purchase order that was not accepted."

When it is agreed that Y Company must give an additional period to X Company, the following clause may be added to the previous one:

> In order to avail itself of the right to declare the outstanding countertrade commitment reduced, Y Company must give X Company written notice specifying that the failure to accept the purchase order constituted a breach of the countertrade commitment and that the outstanding countertrade commitment will be reduced by the amount of the unaccepted purchase order if X Company does not make the goods available within the additional period of [e.g., 30] days."

Footnote to paragraph 21

Assuming that "Y Company" is the party committed to purchase and that "X Company" is the supplier, the clause may read as follows:

> "(1) [Y Company] [X Company] is exempt from the payment of damages, or of an agreed sum, in respect of a failure to fulfil its obligations under the countertrade agreement if that party proves that the failure was due to a physical or legal impediment beyond its control and that the party could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the countertrade agreement or to have avoided or overcome it or its consequences.
>
> (2) The period for the fulfilment of the countertrade commitment will be extended by a period of time corresponding to the duration of the impediment. If the impediment lasts longer than [e.g., six months], [the party against which the impediment is claimed] [either party] may terminate the countertrade agreement by written notice."

Footnote to paragraph 23

> [General definition of exempting impediment followed by illustrative or exhaustive list]
>
> "(1) [Same text as in para. (1) of the illustrative provision to paragraph 21]

(2) [Illustrative list:] The following are examples of events that are to be regarded as exempting impediments, provided that those events satisfy the criteria set forth in paragraph (1): ... . [Exhaustive list:] Only the following events are to be regarded as exempting impediments, provided that those events satisfy the criteria set forth in paragraph (1)."

Footnote to paragraph 44

Assuming that "Y Company" is the exporter (counter-importer) and that "X Company" is the importer (counter-exporter), the clause would read as follows:

"A failure by Y Company to purchase goods pursuant to this countertrade agreement does not entitle X Company to suspend or withhold payment due by X Company to Y Company under the contract for the supply of ... ."

Footnote to paragraph 50, first sentence

"If a contract for the supply of goods in one direction is terminated, neither party is entitled, irrespective of the cause for the termination, to suspend conclusion of contracts in the other direction or to suspend or withhold performance of obligations under concluded contracts in the other direction."

Footnote to paragraph 50, second sentence

"If a contract for the supply of goods by X Company to Y Company concluded pursuant to this countertrade agreement is terminated, neither party is entitled, irrespective of the cause for the termination, to suspend or withhold performance under the contract for the supply of goods by Y Company to X Company."

Chapter XIV. CHOICE OF LAW

[Editorial note: The footnotes to paragraph 21 (to the second sentence and the fourth sentence) appeared in document A/CN.9/WG.IV/WP.51/Add.7* as footnotes to paragraph 20. The modifications in the text of the footnote to paragraph 21, second sentence, are underlined. The footnotes to paragraphs 15 and 24 are new.]

Footnote to paragraph 15

[new footnote] "This countertrade agreement as well as the contracts entered into pursuant to it are to be governed by the rules of (specify the set of rules such as the United Nations Convention on Contracts for the International Sale of Goods)."

Footnote to paragraph 21, second sentence (illustrative provision for the countertrade agreement and for a supply contract)

"This ... (specify countertrade agreement or supply contract) is to be governed by the law of ... (specify a country or a particular territorial unit) [as in force on ... (specify date the countertrade agreement or the supply contract is entered into)]. [This designation refers to the substantive law of (specify the same country or territorial unit as above) and not to its conflict-of-laws rules.]"

Footnote to paragraph 21, fourth sentence (illustrative provision for the countertrade agreement and for a supply contract)

[Same as in footnote to paragraph 21, second sentence, with the addition, after the first sentence, of the following:] "The selected law governs in particular the formation of and validity of the contract and the consequences of its invalidity."

Footnote to paragraph 24

[new footnote] "This countertrade agreement is to be governed by the law of ... (specify a country or a particular territorial unit) [as in force on ... (specify date the countertrade agreement or the supply contract is entered into)]. The contracts concluded pursuant to this countertrade agreement are to be governed by (specify the same law as in the previous sentence or a different law). [The rules of private international law of ... (specify the same country or territorial unit as as in the previous two sentences) do not apply.]" (For the discussion of the question whether the same national law or different national laws should be chosen, see paragraphs 25 to 29.)

Chapter XV. SETTLEMENT OF DISPUTES

The model clauses recommended in the UNCITRAL Conciliation Rules and in the UNCITRAL Arbitration Rules are incorporated in footnotes to paragraphs 14 and 30 of chapter XV (A/CN.9/362/Add.15). In order to implement the decision of the Working Group on International Payments that the Legal Guide should indicate that there exist a number of different conciliation and arbitration rules (A/CN.9/357, para. 101), the following modifications are suggested to draft chapter XV (A/CN.9/362/Add.15):

In paragraph 14, last sentence, delete the words "prepared by an international organization" and add at the end of the paragraph the following sentence: "Other sets of conciliation rules have been prepared by various international and national organizations."

At the end of footnote 1, add the following sentence: "The use of other conciliation rules may also be appropriate in a given case."

In paragraph 30, second sentence, delete the words: "such as the one accompanying the UNCITRAL Arbitration Rules".

At the end of footnote 4, add the following sentence: "The use of other arbitration rules may also be appropriate in a given case."

At the beginning of footnote 5, add the following text: "A number of model arbitration clauses exist. Generally, it is advisable to use the model clause that pertains to the chosen arbitration rules."

UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CN.9/362/Add.17
22 April 1992

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW
Twenty-fifth session
New York, 4 - 22 May 1992

INTERNATIONAL COUNTERTRADE

Draft Legal Guide on International Countertrade Transactions

Report of the Secretary-General

Addendum

CHAPTER SUMMARIES

The Working Group on International Payments decided that, in order to facilitate the use of the Legal Guide, each chapter should be preceded by a summary (A/CN.9/357, para. 15). In accordance with that decision, the present addendum contains summaries of chapters II to XV of the draft Legal Guide.

II. Scope and terminology of Legal Guide

Countertrade transactions covered by the Legal Guide are those transactions in which one party supplies goods, services, technology or other economic value to the second party, and, in return, the first party purchases from the second party an agreed amount of goods, services, technology or other economic value. A distinctive feature of these transactions is the existence of a link between the supply contracts in the two directions in that the conclusion of the supply contract or contracts in one direction is conditioned upon the conclusion of the supply contract or contracts in the other direction (paragraph 1). The discussion in the Guide on goods is generally applicable also to services, and can be used as a broad guidance also for transactions involving technology (paragraph 2). The focus of the Guide is on countertrade transactions in which the goods are delivered across national boundaries (paragraph 3).

8181T

V.92-53479

Countertrade transactions take a variety of forms and display differing features. The discussion in the Legal Guide is relevant generally to all types of countertrade unless otherwise indicated (paragraphs 4 to 6).

The Guide focuses on the drawing up of contractual clauses that are specific to or of particular importance for international countertrade (paragraph 7). As a rule, it does not deal with the content of the contracts for individual supplies of goods under a countertrade transaction since those contracts generally resemble contracts concluded as discrete and independent transactions (paragraph 8).

In some countries, countertrade is subject to governmental regulations, which may promote or restrict countertrade in a variety of ways. In addition, various aspects of countertrade transactions are likely to be subject to regulations that are not specifically oriented to countertrade. Since the regulations are disparate and often changed, advice is given, where appropriate, in the form of a general warning that a matter being discussed may be subject to mandatory regulations (paragraphs 9 and 10). Private law questions involved in countertrade generally do not vary from region to region (paragraph 11).

Terminology used in countertrade varies, and no prevailing terminology has developed. The chapter establishes the terminology used in the Legal Guide for various types of countertrade transactions as well as for parties, contracts and subject-matters involved in a transaction (paragraphs 12 to 28).

The terms used for various types of countertrade are: "barter" (paragraph 14); "counter-purchase" (paragraph 15); "buy-back" (paragraph 16); "direct offset" and "indirect offset" (paragraph 17).

The terms used to denote parties to countertrade transactions are: "purchaser"; "supplier" or "party" (paragraph 18); "exporter" or "counter-importer" (paragraph 19); and "importer" or "counter-exporter" (paragraph 20).

The term "countertrade transaction" is used to refer to the whole countertrade arrangement (paragraph 23). The expressions for various contracts forming part of a countertrade transaction are: "countertrade agreement" (an agreement setting forth various stipulations on the manner in which the countertrade transaction is to be implemented (paragraph 24)); "countertrade commitment" (a commitment of the parries to enter into a future contract (paragraph 25)); "supply contracts" (paragraph 26); "export contract", "import contract", "counter-export contract", and "counter-import contract" (paragraph 27).

The use of the term "goods" is explained in paragraph 28.

III. Contracting approach

Parties may embody their obligations in regard to the shipments of goods in the two directions in a single contract or in separate contracts. A single contract may take the form of a barter contract, which is a contract involving an exchange of goods for goods, or the form of a "merged contract", an arrangement in which the two contracts, one for the delivery of goods in one direction and the other for the delivery of goods in the other direction, are merged into one comprehensive contract. The difference between a barter

contract and a merged contract is that, under a barter contract, the delivery of goods in one direction constitutes payment for the delivery of goods in the other direction, while, under a merged contract, each delivery of goods gives rise to a monetary payment obligation (paragraphs 1 to 10).

When the shipments in the two directions are embodied in separate contracts, various contracting approaches are used. Under one approach, the export contract and the countertrade agreement are concluded simultaneously and the counter-export contract is concluded subsequently (paragraphs 11 to 19). This approach is used when the parties wish to finalize a contract for the shipment in one direction (export contract) before they are able to agree on the contract for the shipment in the other direction (counter-export contract). The purpose of the countertrade agreement in such a case is to express the commitment to conclude a counter-export contract or contracts and, to the extent possible, to outline the terms of the future contract and to establish procedures for concluding and carrying out supply contracts. Possible issues to be addressed in such a countertrade agreement are enumerated in paragraphs 29 to 39.

Under another approach, the countertrade agreement is concluded prior to the conclusion of any definite supply contracts. This approach is usually used when the parties wish to lay down a contractual framework within which a certain level of reciprocal trade should be generated over a period of time. The aim of the countertrade agreement in such a case is to express the commitment to conclude supply contracts in the two directions and, to the extent possible, to outline the terms of the future contracts and to establish procedures for concluding and carrying out those contracts (paragraphs 11, 12, 20 and 21). Possible issues to be addressed in such a countertrade agreement are enumerated in paragraphs 29 to 39.

Under yet another approach, the parties conclude simultaneously the separate supply contracts for the shipment in each direction and the countertrade agreement establishing a relationship between those contracts (paragraphs 11, 12, 40 and 41). Since this approach does not require a commitment to conclude future contracts, this contracting approach raises a limited number of issues. The main issue to be addressed in the countertrade agreement is the manner in which the obligations of the parties with respect to the shipments in the two directions are to be linked. Other possible issues are mentioned in paragraphs 41 and 42.

In many countries a party exporting goods, services or technology may obtain insurance against the risk that the payment claim arising from the export will not be paid. Insurable risks include commercial and non-commercial risks. Among the principles on which the export-credit insurance is based, some are particularly relevant to countertrade transactions (paragraphs 43 to 51, in particular 49 to 52).

Parties often require financing in order to be able to carry out the transaction. An important factor in the consideration by the financial institution whether to grant financing is the ability of the party requesting financing to insure its risk that the payment claim arising from its delivery of goods will not be paid. Financing may be in the form of a supplier credit or a buyer credit (paragraphs 53 to 55).

IV. Countertrade commitment

A countertrade commitment is an undertaking to conclude a future contract or a series of supply contracts in one or in both directions (paragraph 1). A commitment may be a "firm" commitment or a more limited "best-efforts" type of commitment. The Legal Guide focuses on firm countertrade commitments (paragraph 2).

The extent of a countertrade commitment, i.e., the amount of goods to be purchased, may be expressed as an absolute monetary value, as a percentage of the value of the goods delivered, or as a number of units of a given type of goods (paragraphs 3 and 4). The countertrade agreement may provide that only the purchases that exceed the usual quantities purchased will be considered as fulfilling the countertrade commitment ("additionality") (paragraphs 5 and 6).

The parties may specify in the countertrade agreement that the period for fulfilment of the countertrade commitment is to commence on a fixed date and to expire on a fixed date (paragraph 7), or that the fulfilment period of an agreed length is to commence when an event specified in the countertrade agreement takes place (paragraph 8). A number of factors are relevant in the determination of the length of the fulfilment period (paragraph 9 to 12). The fulfilment period may be extended in certain circumstances (paragraphs 13 to 16). Where fulfilment of the countertrade commitment involves many shipments over a long period of time, the parties may wish to divide the fulfilment period into subperiods (paragraphs 17 to 20).

The parties should define the supply contracts that will be counted towards fulfilment of the countertrade commitment ("eligible supply contracts"). Eligible supply contracts may be defined by specifying the type of goods to be purchased (paragraphs 21 to 25), by the geographical origin of the goods (paragraphs 26 and 27), by the identity or the type of the supplier (paragraph 28), or by the identity or type of purchaser (paragraph 29). It may be agreed that under certain circumstances non-conforming purchases will be counted towards fulfilment of the countertrade commitment (paragraph 30).

In many countertrade transactions, the full purchase price of a supply contract is deducted from the outstanding countertrade commitment (the deducted amount is referred to as "fulfilment credit"). Sometimes it is agreed that fulfilment credit will be granted at a rate higher or lower than the full purchase price, depending on the type of goods purchased, the identity of the supplier or the time when a purchase is made (paragraphs 31 to 34).

It is advisable that the countertrade agreement indicate the specific action that must be taken in order for the countertrade commitment to be fulfilled. The parties may agree either that fulfilment occurs upon the conclusion of a supply contract or upon the performance of a supply contract (paragraphs 35 to 37).

It is advisable that the parties include in the countertrade agreement, in as definite a manner as feasible, the terms of the future contract (paragraphs 38 to 43) or provide for means for subsequent determination of those terms. Those means include standards or guidelines to be used in determining a particular contract term (paragraphs 44 to 46), determination of a contract term by a third person (paragraphs 47 to 54), and determination of a contract term by a contract party (paragraphs 55 and 56).

In addition, the countertrade agreement may provide for negotiation procedures for the conclusion of a supply contract (paragraphs 57 to 60).

The parties may wish to consider establishing procedures for monitoring and recording the progress made in fulfilment of the countertrade commitment (paragraph 61). Such procedures include the exchange of information (paragraphs 62 to 64), the confirmation of fulfilment of a countertrade commitment (paragraphs 65 to 67), and "evidence accounts" (paragraphs 68 to 74).

V. General remarks on drafting

The parties may find it desirable to establish a checklist of the necessary steps to be taken in negotiating and drawing up contracts constituting the transaction (the countertrade agreement and the supply contracts) (paragraphs 1 and 2). The applicable law may require that the contracts should be in writing; even if no such requirement exists, it is recommended that the contracts be in writing (paragraph 3).

In drawing up contracts that make up the countertrade transaction, the following matters should be taken into account: the relationship between the contract documents, on the one hand, and the oral exchanges, correspondence and draft documents, on the other hand (paragraph 4); designation of one person primarily responsible for supervising the preparation of the drafts (paragraph 5); provisions of the applicable law on the interpretation of contracts and presumptions on the meaning of certain expressions (paragraph 6); mandatory provisions (paragraph 7); introductory recitals (paragraph 8); use of standard forms, general conditions, standard clauses and previously concluded contracts (paragraph 9); use of one or more than one language for the contractual documents (paragraphs 10 to 12); identification and description of the parties in a principal document designed to come first in logical sequence amongst various documents (paragraph 13); the source of the legal status of parties that are legal persons, and any particular considerations when a party is a governmental agency (e.g., authorization for the conclusion of a contract or an arbitration agreement) (paragraph 14); the name, address, status and authority of any agents (paragraph 15).

It is desirable for the parties to consider the form that notifications under the countertrade transaction are to take and the means of transmittal (paragraph 16 and 17), the point of time when notifications are to be deemed effective (paragraph 18), addressees of notifications (paragraph 19), and the consequences of a failure to notify and of a failure to respond to a notification (paragraph 20).

It is advisable to define certain key expressions or concepts that are frequently used in the countertrade agreement or in the supply contracts (paragraphs 21 to 24).

VI. Type , quality and quantity of goods

The discussion concerning "goods" in the Legal Guide is broadly applicable also to services and technology (paragraph 1).

The parties may either identify in the countertrade agreement the type of goods that will be the subject of the future supply contract, possibly

stating only broad categories of goods, or not stipulate the type of goods. Precision as to type, quality and quantity increases the likelihood that the intended supply contract will be concluded. Sometimes, even though the type of countertrade goods is identified in the countertrade agreement, the exact quality and quantity of the goods are left for later determination because the conditions on which the parties wish to base their decision on quantity and quality are not yet fully known (paragraph 2).

Various commercial considerations enter into the selection of the type of goods to be supplied under the countertrade transaction. The freedom of the parties to agree on the type of goods may be affected by government regulations (paragraphs 3 to 6).

When the parties conclude a countertrade agreement without determining the type of goods, they may wish to include in the countertrade agreement a list of goods the purchase of which would count toward fulfilment of the countertrade commitment. If such a list is used, the parties may settle questions such as the availability of goods on the list, purchaser's duty to provide specifications and requirements, "additionality" and procedure for deciding on the type of goods (paragraphs 7 to 14). Services and technology as subject-matters of countertrade are discussed in paragraphs 15 to 23.

The question of quality of countertrade goods raises two main issues that the parties may address in the countertrade agreement: expressing the level of quality that the goods offered for purchase must possess (paragraphs 24 to 28), and the establishment of procedures to ascertain, before the conclusion of a supply contract, whether goods being offered meet the specified level of quality (paragraphs 29 to 32).

The quantity of goods to be purchased may be specified in the countertrade agreement or left to be determined at the time of the conclusion of the supply contracts. The quantity may be expressed as a monetary amount or as a number of units to be purchased, or the quantity may be left to be determined on the basis of the purchaser's requirements or the supplier's output (paragraphs 33 to 39).

Particularly in long-term transactions, it may be provided that, at regular intervals or in response to specified changes of circumstances, the parties will review the provisions in the countertrade agreement on the type, quality or quantity of goods. The parties may wish to stipulate in the countertrade agreement that under certain conditions fulfilment credit would be earned by the purchase of goods other than those stipulated in the countertrade agreement (paragraph 40 and 41).

VII. Pricing of goods

The chapter deals with methods for determining the price of goods that will be the subject-matter of the supply contract to be concluded pursuant to the countertrade commitment. It also deals with certain pricing questions encountered in the specific contexts of supplying services and the transfer of technology. In addition, it discusses the currency in which a price is expressed and the revision of a price.

It is advisable that the parties specify in the countertrade agreement the price of the goods that will be the subject-matter of the future supply contract. When the parties are not able to do so, it is advisable to provide

in the countertrade agreement a method for determining the price at the time the supply contract is to be concluded (paragraphs 1 to 6).

The currency in which the price is to be paid may involve risks arising from the fluctuation in exchange rates between that currency and other currencies. In stipulating the currency, the parties should take into consideration foreign exchange regulations. The parties may wish to denominate the price in a stable currency or in a unit of account (paragraphs 7 to 10).

The countertrade agreement may provide for a determination of the price through the use of a standard, a method that provides a price at the time of the conclusion of a supply contract in a manner not influenced by the will of the parties. Possible price standards include: a reported market price for goods or services of standard quality; production cost of the goods; competitor's price; most-favoured-customer price (paragraphs 11 to 20).

The parties may stipulate in the countertrade agreement that the price to be paid under a future supply contract will be negotiated at a time subsequent to the conclusion of the countertrade agreement. It is advisable that, to the degree possible, the parties agree on guidelines for the negotiation of the price (paragraphs 21 to 24).

Sometimes the parties provide for the price to be set by an independent third person (e.g., a market specialist in the goods in question) (paragraphs 25 and 26). Sometimes it is agreed that the price will be determined by one of the parties to the countertrade agreement, a method with respect to which utmost caution is advisable (paragraph 27).

Prices for services may be set as rates for units of work processes or as a lump sum, or they may be set on a cost-reimbursable basis (paragraphs 28 to 31).

For setting the price for a technology transfer, the two principal forms are the lump-sum payment and payment of royalties (paragraphs 32 to 38).

When multiple shipments are spread out over a period of time, there may be a need to revise the price in order to reflect changes in the underlying economic conditions. A revision may take place at specified points of time or in response to specified changes in the economic conditions (paragraphs 39 to 43). Possible methods of price revision include the reapplication of the method used to determine the original price (paragraph 44); an index clause, a method by which the price of the countertrade goods is made to depend on the levels of the prices of specified goods or services (paragraphs 45 to 47); a currency clause or a unit-of-account clause, whereby the price is linked to an exchange rate between the currency in which the price is to be paid and a stipulated other currency (paragraphs 48 to 52).

VIII. Participation of third parties

The chapter deals with cases in which a party committed to purchase or committed to supply goods, instead of itself purchasing or supplying goods, engages a third party to do so (sections B and C). Section D deals with "multi-party" transactions that are distinct from the cases discussed in sections B and C.

A party committed under a countertrade agreement to purchase goods (party "originally" committed to purchase goods) often engages a third party ("third-party purchaser") to make those purchases (paragraphs 4 to 7). When such participation of a third-party purchaser is envisaged, it is advisable to address in the countertrade agreement the question of the selection of the third-party purchaser and the question of who would be liable to the supplier in the event of a failure by the third party to make the purchases needed to fulfil the countertrade commitment (paragraphs 9 to 20). In addition, the party originally committed to purchase goods and the third-party purchaser should conclude a contract to deal with questions such as the nature of the commitment of the third party (a "firm" commitment or a "best-efforts" commitment, paragraph 22); fee payable to the third party (paragraphs 30 to 36); "hold-harmless" clause (paragraph 37); and the question whether the third party should have an exclusive or non-exclusive mandate to purchase and resell the goods (paragraphs 38 to 40).

Sometimes, the parties to the countertrade agreement agree that the party making purchases beyond what is required to liquidate its outstanding countertrade commitment will be allowed to have the excess fulfilment credit counted towards fulfilment of countertrade commitments that the purchaser or a third party may assume in the future (paragraph 8).

The party committed to supply goods (party "originally" committed to supply) sometimes designates a third party ("third-party supplier") to supply the goods (paragraphs 41 to 44). When the participation of a third-party supplier is envisaged, it is advisable for the countertrade agreement to address the selection of the third party and the consequences of the failure by the third party to make the agreed goods available. In some transactions, the selection of the third-party supplier is left to the party committed to purchase goods (paragraphs 45 and 46). In other transactions, the selection is left to the party originally committed to supply goods (paragraphs 47 to 52).

As to "multi-party" countertrade transactions, three types are described in the chapter: (a) tripartite transaction that involves the exporter (who does not at any stage of the transaction assume a commitment to counter-import), the importer and the third-party counter-importer; (b) tripartite transaction that involves the exporter, the importer (who does not at any stage of the transaction assume a commitment to counter-export) and a third-party counter-exporter; and (c) four-party transaction in which the supply contract in one direction is concluded by one set of parties and the supply contract in the other direction is concluded by two other parties (paragraphs 53 to 58).

IX. Payment

Parties to a countertrade transaction may decide to link payments for the supply contracts in the two directions in such a way that the proceeds generated by the supply contract in one direction are to be used to pay for the supply contract in the other direction. This allows the transfer of funds between the parties to be avoided or reduced (paragraphs 1 to 8).

Sometimes it is agreed that the shipment in a particular direction (export contract) is to precede the shipment in the other direction (counter-export contract) in order to generate funds to pay for the

counter-export. In such a case, sometimes referred to as "advance purchase", it may be agreed that the proceeds of the export contract are to be retained by the importer until payment under the subsequent counter-export contract becomes due (paragraphs 9 to 13). When in an advance-purchase situation the proceeds generated by the export contract are not to be left under the control of the importer, the parties may agree on the use of a "blocked account" or of "crossed letters of credit" (paragraphs 14 to 18). Under a blocked-account method, the proceeds generated by the export contract are deposited in an account at an agreed bank, and the release of the money, intended as payment for the counter-export goods, is subject to agreed conditions (paragraphs 19 to 30). When crossed letters of credit are to be used, the funds payable under a letter of credit opened by the importer in favour of the exporter ("export letter of credit") are blocked in order to be used to cover the letter of credit opened by the counter-importer in favour of the counter-exporter ("counter-export letter of credit") (paragraphs 31 to 37).

The parties may agree that their payment claims arising from the shipments made in the two directions would be set off. If an imbalance arises in the values of the deliveries, it can be settled by delivery of additional goods or by payment of money. In order to facilitate the setoff of claims, in particular in the case of multiple shipments, the parties may wish to use a record-keeping mechanism, which is referred to in the Guide as a "setoff account". A setoff account may be administered by the parties themselves or by a bank or banks (paragraphs 38 to 57).

Certain issues common to linked payment mechanisms (currency, designation of banks, interbank agreements, unused or excess funds, supplementary payments or deliveries, and bank charges) are discussed in paragraphs 58 to 65.

In the case of a "multi-party" countertrade transaction (i.e., "tripartite" or "four-party" countertrade; see chapter VIII), it might be agreed that the proceeds of the supply contract between one pair of parties will be used to pay for the supply contract between a different pair of parties. In a tripartite transaction involving a third-party counter-importer, the importer, instead of transferring money to the exporter under the export contract, delivers goods to the counter-importer and is considered to have discharged the payment obligation for the import up to the value of countertrade goods delivered to the counter-importer; the counter-importer, in turn, pays the exporter an amount equivalent to the value of the goods received from the counter-exporter. Similarly, in a tripartite transaction involving a third-party counter-exporter, the importer transfers funds to the counter-exporter to pay for the shipment to the counter-importer, and the counter-importer (exporter) agrees that the payment claim under the export contract is discharged up to the value of the goods delivered to the counter-importer. In a four-party transaction, the exporter ships goods to the importer, and the importer, instead of paying the exporter, pays to the counter-exporter an amount equivalent to the value of the goods received from the exporter. The payment from the importer to the counter-exporter compensates the counter-exporter for the shipment to the counter-importer. The counter-importer pays to the exporter an amount equivalent to the value of the goods received from the counter-exporter (paragraphs 66 to 73).

As in countertrade involving two parties, blocked accounts and crossed letters of credit may be used in multi-party countertrade (paragraphs 74 to 77).

X. Restrictions on resale of countertrade goods

Sometimes the parties agree in the countertrade agreement or in a supply contract to restrictions on the resale of goods purchased pursuant to the countertrade commitment (paragraphs 1 and 2).

The parties should be aware that many legal systems contain mandatory rules on restrictive business practices, and the parties should ensure that a resale restriction they contemplate using is not in contravention of those rules. Mandatory rules of this type may contain generally worded prohibitions against practices that unduly restrain competition and thereby put competitors or consumers at an unfair disadvantage or harm the national economy. Furthermore, there often exist specific prohibitions against particular types of restrictive business practices (e.g., against agreements setting a minimum price) (paragraph 3).

When a resale restriction is contemplated, it is advisable to be as specific as possible in the countertrade agreement as to the content of the restriction (paragraphs 4 to 7).

Parties to a countertrade transaction sometimes include in the countertrade agreement provisions that restrict the freedom of the supplier of countertrade goods to market the type of goods that are the subject-matter of the countertrade transaction (paragraph 8).

The countertrade agreement may provide that the party purchasing goods under the countertrade agreement is to inform the supplier as to certain aspects of the resale of the goods, such as the territory of resale, resale price, or packaging or marking of the goods (paragraphs 9 and 10).

Parties to a countertrade transaction sometimes agree on restrictions as to the territory where the party purchasing goods may resell those goods (paragraphs 11 to 16).

Sometimes countertrade agreements contain provisions concerning the minimum resale price of the goods. It should be noted that in many States, under mandatory rules relating to restrictive business practices, setting a minimum resale price is generally prohibited or permitted only in limited circumstances (paragraphs 17 to 20).

The countertrade agreement may contain requirements as to the type of packaging or marking to be used in reselling the goods. The parties should ensure that any packaging or marking requirements do not conflict with mandatory provisions at the place where the goods are to be resold (paragraphs 21 and 22).

When it is possible that the party committed to purchase goods will engage a third party to make the purchases, the supplier may be interested in the observation by the third party of resale restrictions stipulated in the countertrade agreement (paragraphs 23 and 24).

Changes in the underlying commercial circumstances may make it appropriate to provide in the countertrade agreement for a review of agreed upon resale restrictions (paragraph 25 and 26).

XI. Liquidated-damages and penalty clauses

Liquidated-damages clauses and penalty clauses provide that a failure by a party to perform a specified obligation, or a failure to perform it on time, entitles the aggrieved party to receive from the party failing to perform a sum of money agreed upon at the time the parties established their contractual relationship. The agreed sum may be intended to stimulate performance of the obligation, or to compensate for losses caused by the failure to perform, or to do both (paragraph 1).

The chapter focuses on liquidated-damages and penalty clauses covering a failure to fulfil the countertrade commitment (paragraph 2). Such a failure may take the form of non-fulfilment or delayed fulfilment of the commitment (paragraphs 3 and 4). The clause may cover the purchaser's commitment to purchase goods or the supplier's commitment to make goods available (paragraphs 5 and 6).

Many national laws have provisions on liquidated-damages and penalty clauses. Those provisions include: a mandatory restriction in some legal systems that clauses fixing an agreed sum to stimulate performance are invalid and that the party subject to such a clause is liable for a failure to perform only for the damages recoverable under the general law (paragraph 7); rules giving a power to the courts to reduce the amount of the agreed sum, or to award additional damages when the actual damage exceeds the agreed sum (paragraph 7); the rule that the agreed sum is not due if the party who failed to perform the obligation in question is not responsible for the failure (paragraph 8); other rules on the relationship between the recovery of the agreed sum and the recovery of damages (paragraph 12).

Liquidated-damages or penalty clauses should be distinguished from clauses limiting the amount recoverable as damages, clauses providing alternative obligations and clauses establishing an obligation to liquidate through cash payments imbalances in the flow of trade in barter contracts or where countervailing payment claims are to be set off (paragraphs 9 and 10).

Where a party originally committed to purchase or to supply goods engages a third party to fulfil that commitment, it may be agreed that the third party is to pay liquidated damages or a penalty to the party originally committed in the event of a breach of the third party's commitment to purchase or to supply goods (paragraph 11).

An important question to consider is whether, by claiming the agreed sum, the beneficiary of the clause should be deemed to have forsaken fulfilment of the underlying obligation. Often the intention of the parties to countertrade transactions is that the beneficiary who chooses to claim the agreed sum is precluded from also claiming the fulfilment of the countertrade commitment. Sometimes, the parties intend that the agreed sum is to be payable for delay in fulfilment of the commitment, in which case the countertrade commitment remains outstanding despite payment of the agreed sum. It is advisable that the parties specify the effect of payment in the countertrade agreement (paragraphs 13 to 16).

The amount of liquidated damages or a penalty may be expressed as an absolute amount or as a percentage of the value of the outstanding countertrade commitment (paragraph 17). When the clause covers delay, an agreed sum is often fixed by way of increments, a specified amount being due for a specified time unit of delay (paragraph 18). Considerations relating to

determining the appropriate amount of the agreed sum are discussed in paragraphs 19 to 23.

Issues related to obtaining the agreed sum that may be dealt with in the countertrade agreement include the following: a cut-off time for claiming the agreed sum (paragraph 24); payment of the agreed sum when the period for the fulfilment of the countertrade commitment is divided into subperiods (paragraph 25); a beneficiary's right to deduct the agreed sum from funds held by the beneficiary or a beneficiary's right to set off the claim to the agreed sum against a countervailing claim (paragraph 26); an independent guarantee to cover the obligation to pay the agreed sum (paragraph 27). The countertrade agreement may also address the possibility to terminate the countertrade commitment when the liquidated-damages or penalty clause covers delay (paragraph 28), and the effect of the termination of the countertrade commitment on the obligation to pay the agreed sum (paragraph 29).

XII. Security for performance

The parties to a countertrade transaction may agree to use a guarantee to cover the fulfilment of the countertrade commitment. A guarantee may be used for the obligation to purchase goods, the obligation to supply goods, or both those obligations (paragraph 1).

A guarantee may be independent of, or accessory to, the underlying obligation. Under an independent guarantee, the guarantor is obligated to pay when the beneficiary of the guarantee presents to the guarantor a demand for payment and any additional document required under the terms of the guarantee; such a document may be, for example, the beneficiary's statement that the party who procured the guarantee (the "principal") has breached the underlying obligation, the beneficiary's statement specifying the circumstances that constitute the breach, or a certificate or decision by a third person stating that the breach of the underlying obligation has occurred. The guarantor, in determining whether to pay, is not called upon to investigate whether the underlying obligation has in fact been breached, but is limited to verifying whether the demand for payment and the supporting documents conform to the requirements specified in the guarantee. Despite the independence of the guarantee from the underlying obligation, payment under the guarantee may exceptionally be refused, in particular when the payment claim is fraudulent (paragraph 3).

Under an accessory guarantee, the guarantor must, before paying a claim, ascertain whether the underlying obligation was breached, and the guarantor is normally entitled to invoke all the defences that the principal could invoke against the beneficiary (paragraph 4).

The discussion in the chapter is limited to independent guarantees, without thereby implying a preference for this type of guarantee. The discussion in the chapter applies not only to securities in the form of guarantees but also to securities in the form of stand-by letters of credit, which are the functional equivalent of independent guarantees (paragraphs 5 and 6).

When a guarantee is to be used, the parties should include in the countertrade agreement provisions on questions such as: who is to procure the guarantee (paragraph 8); whether payment under the guarantee releases the principal from the countertrade commitment (paragraph 9); the identity of the

guarantor or how a guarantor is to be chosen (paragraphs 10 to 16); the documents that the beneficiary would have to present for the guarantor to be obligated to pay (paragraphs 17 to 22); the amount of the guarantee and possibly a mechanism to reduce that amount as fulfilment of the countertrade commitment progresses (paragraphs 23 to 26); time when the guarantee is to be issued (paragraphs 27 to 30); expiry of the guarantee (paragraphs 31 to 33); return of the guarantee instrument (paragraph 34); obligation to procure an extension of the guarantee as a result of an extension of the period for the fulfilment of the countertrade commitment (paragraphs 35 and 36); modification of the underlying commitment and modification of the guarantee (paragraphs 37 to 39).

In transactions in which goods shipped in the two directions are not to be paid in money, guarantees may be used to secure the liquidation through cash payment of a possible imbalance in the flow of trade (paragraphs 40 to 48).

XIII. Failure to complete countertrade transaction

This chapter discusses remedies for non-fulfilment of the countertrade commitment (section B) and circumstances in which a party is exonerated from liability for a failure to fulfil the countertrade commitment (section C). Also discussed is the effect of a failure to conclude or perform a supply contract in one direction on the obligations of the parties to conclude or perform supply contracts in the other direction (section D). The discussion is set in the context of "firm" countertrade commitments (paragraphs 1 to 3).

It is advisable that countertrade agreements stipulate the remedies for a failure to fulfil the countertrade commitment since national laws generally do not contain rules specifically tailored to countertrade (paragraphs 4 and 5). Remedies to be considered are the release of a party from the countertrade commitment (paragraphs 6 to 10) or a monetary compensation, in particular in the form of liquidated damages or a penalty (paragraphs 11 and 12).

During the period for the fulfilment of the countertrade commitment, events of a legal or physical nature may occur that impede, permanently or temporarily, a committed party from concluding an envisaged supply contract. The party who fails to fulfil its commitment due to such an impediment may, according to the applicable law or according to the provisions of the countertrade agreement, be granted additional time to fulfil the commitment or may be released altogether from the commitment. Impediments that give rise to such an exemption are referred to as "exempting impediments" (paragraph 13).

Many national laws contain provisions concerning exempting impediments. However, since those provisions may lead to results that are incompatible with the needs of a given transaction, the parties may wish to include in the countertrade agreement a clause specifying the legal consequences of an exempting impediment (paragraphs 14 to 18) and a clause defining exempting impediments (paragraphs 19 to 34). The countertrade agreement may also contain a requirement that the party invoking an exempting impediment must give written notice of the impediment to the other party (paragraphs 35 and 36).

Since in a countertrade transaction the conclusion of a supply contract in one direction is conditioned upon the conclusion of a supply

contract in the other direction, the question may arise whether a failure to conclude or perform a contract in one direction should have an effect on the obligation to conclude or perform a contract in the other direction. National laws normally do not provide a specific answer to the question of such interdependence of obligations in countertrade transactions. Therefore, in order to avoid uncertainty or disagreement, the parties may wish to include in the countertrade agreement clauses indicating the extent of the interdependence of obligations (paragraphs 37 to 42). Such clauses may address in particular the following problems in the completion of countertrade transactions: failure to conclude a supply contract as stipulated in the countertrade agreement (paragraphs 43 to 48), termination of a supply contract (paragraphs 49 to 55), failure to meet a payment obligation under a supply contract (paragraphs 56 to 60), failure to deliver goods under a supply contract (paragraph 61).

XIV. Choice of law

The chapter focuses on the choice by the parties to a countertrade transaction of the law applicable to the countertrade agreement, the supply contracts in the two directions, and the contract by which a party committed to fulfil a countertrade commitment engages a third party to fulfil that commitment. The chapter considers also the question whether the countertrade agreement and the contracts forming part of the transaction should be made subject to a single national law or to different national laws (paragraph 1).

Under the rules of "private international law" (or "conflict-of-laws" rules) of many States, parties are permitted to choose by agreement the applicable law, though under some of those laws there are restrictions on that choice. If the parties do not choose the applicable law, the applicable law is determined by the application of rules of private international law (paragraph 2). By choosing the applicable law, the parties do not make a choice as to jurisdiction (paragraph 3). Whatever the chosen law, particular aspects of the countertrade transaction may be affected by mandatory rules (paragraphs 4 and 30 to 33). The extent to which the parties may designate issues to be governed by the chosen law may be limited (paragraph 5). The relevance of the United Nations Sales Convention for a countertrade transaction is discussed in paragraph 6.

In order to avoid uncertainty as to what law applies, it is desirable for the parties to choose expressly the applicable law to govern the countertrade agreement and the supply contracts (paragraphs 8 to 11). The extent to which the parties are allowed to choose the applicable law is determined by the rules of private international law. Under some systems of private international law, the autonomy of parties is limited, and they are permitted to choose only a national law that has some connection with the contract (the "nexus" rule). Under most systems of private international law, parties are permitted to choose the applicable law without those restrictions (paragraph 12).

When choosing the applicable law, it is in general advisable to choose the law of a particular country (paragraphs 13 to 18). Parties may wish to take the following factors into consideration in choosing the applicable law: the parties' knowledge of, or possibility of gaining knowledge of, the law; the capability of the law to settle in an appropriate manner the legal issues arising from the contractual relationship; the extent to which the law contains mandatory rules that would prevent the parties from settling by

agreement questions that arise in their contractual relationship (paragraph 19). Further issues the parties may wish to bear in mind are: possible changes legislated in the law chosen by the parties (paragraph 20); approach to the drafting of the choice-of-law clause (paragraph 21); separateness of the choice-of-law clause from the rest of the contract (paragraphs 22); applicability of the chosen law to the prescription of rights (limitations of actions) (paragraph 23); advisability of designating the applicable law not only for the countertrade agreement but also for the future supply contracts (paragraph 24).

In choosing the applicable law, the parties may wish to consider whether the countertrade agreement and the supply contracts should be made subject to a single national law or to different national laws (paragraphs 25 to 29).

XV. Settlement of disputes

It is advisable that the parties agree on the method by which future disputes arising out of the countertrade agreement and the related supply contracts would be settled. Dispute-settlement methods include negotiation, conciliation, arbitration and judicial proceedings (paragraphs 1 to 6). In some States, restrictions exist as to the freedom of a State agency to conclude an arbitration agreement or to agree to the jurisdiction of a court of a foreign State (paragraph 7).

Usually, the most satisfactory method of settling a dispute is through amicable settlement by negotiation between the parties (paragraphs 8 to 11).

If the parties fail to settle a dispute through negotiation, they may wish to attempt to do so through conciliation before resorting to arbitral or judicial proceedings. The object of conciliation is to achieve an amicable settlement of the dispute with the assistance of a neutral conciliator. If the parties provide for conciliation, they may settle relevant procedural issues by agreeing on a set of conciliation rules such as the UNCITRAL Conciliation Rules (paragraphs 12 to 15).

There are various reasons why arbitration is frequently used for settling disputes arising in countertrade transactions (paragraphs 16 and 17). In general, arbitral proceedings may be conducted only if the parties agree thereto. Since it may be more difficult to reach an agreement to arbitrate after a dispute has arisen, it is advisable to enter into an arbitration agreement at the outset of the countertrade transaction (paragraphs 18 and 23). The parties are able to select the type of arbitration that best suits their needs (paragraphs 24 to 26).

The arbitral proceedings will normally be governed by the procedural law of the State where the proceedings take place. It is advisable for the parties to agree on a set of arbitration rules to govern arbitral proceedings under their agreement. When the parties choose to have their arbitrations administered by an institution, the institution may require the parties to use the rules of that institution (paragraphs 27 to 29). Some arbitration rules contain a model arbitration clause that invite the parties to settle in the arbitration clause matters such as the involvement of an appointing authority and the number of arbitrators (paragraphs 30 to 34), the place of arbitration (paragraphs 35 to 39) and the language or languages to be used in the arbitral proceedings (paragraphs 40 and 41).

Disputes that are not settled through negotiation or conciliation can be settled, if the parties do not opt for arbitration, in judicial proceedings. Courts of two or more States may be competent to decide a given dispute. Parties may agree on a jurisdiction clause under which the parties are obligated to submit disputes to a specified court (paragraphs 42 to 45).

Countertrade transactions often involve several contracts, in addition to the countertrade agreement. In such multi-contract transactions, the parties may wish to consider whether it would be desirable to agree on a single body for the settlement of all disputes that may arise in the transaction, i.e., the same conciliator, arbitral tribunal or court (paragraphs 46 to 49).

Disputes may arise in a countertrade transaction that involve or affect not only the exporter and the importer, but other parties as well, in particular third persons engaged in the transaction as purchasers and suppliers of countertrade goods. In such multi-party disputes, it may be desirable to settle all related issues in the same dispute settlement proceedings (paragraphs 50 to 53).